132-592

132-592

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~752.~~ 1471

DAVID RICHMOND, PLAINTIFF IN ERROR,

vs.

MARSHALL B. BLAKE, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND COLLECTION DISTRICT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1886.

recession 28,905

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 752.

DAVID RICHMOND, PLAINTIFF IN ERROR,

vs.

MARSHALL B. BLAKE, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND COLLECTION DISTRICT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 24, 1887.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between David Richmond, plaintiff, and Marshall B. Blake, as collector of internal revenue in and for the second collection district of New York, defendant, a manifest error hath happened, to the great damage of the said David Richmond as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, eighteen hundred and eighty-six, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 30th day of March, in the year of our Lord one thousand eight hundred and eighty-six.

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed.

WM. J. WALLACE.

2 [Endorsed:] No. —. U. S. Supreme Court. David Richmond, plaintiff in error, against Marshall B. Blake, as collector of internal revenue in and for the second collection district of New York, defendant in error. Writ of error. Tremain & Tyler, att'ys for pl'ff in error, 167 Broadway, New York City.

Due service of a copy of the within writ of error is hereby admitted.

Dated, New York City, March 30, 1886.

STEPHEN A. WALKER,
U. S. Att'y.

[Stamped.] U. S. circuit court. Mar. 30, 1886. Timothy Griffith, clerk.

UNITED STATED OF AMERICA,
Southern District of New York, } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States for the southern district of New York in the second

circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four to eighty-five, inclusive, contain a true and complete — of the records and proceedings had in said court, in the case of David Richmond, plaintiff in error, against Marshall B. Blake, as collector of internal revenue in and for the second collection district of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-sixth day of July, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[Seal of the Circuit Court, Southern District of New York.]

TIMOTHY GRIFFITH, *Clerk.*

4 *Summons.*

New York Supreme Court.

DAVID RICHMOND, Plaintiff,
against
MARSHALL B. BLAKE, as Collector of Internal Revenue in and for the Second Collection District of New York, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated July 30, '84.

TREMAIN & TYLER,
Plaintiff's Attorneys.

Office & P. O. address: No. 167 Broadway, N. Y. city.

5 [Endorsed:] N. Y. supreme court. David Richmond vs. Marshal B. Blake, as collector of internal revenue in and for the second collection district of New York. Copy of summons. Tremain & Tyler, pl'ff's att'ys, 167 B'way, N. Y. city. To Marshall B. Blake, def't. Rec'd July 31, '84. M. B. B. Tremain and Tyler, law offices, Jul- 30, 1884, Broadway, N. Y. city.

6 *Notice of Appearance and Demand.*

N. Y. Supreme Court.

DAVID RICHMOND *versus* MARSHAL B. BLAKE.

You will please take notice that I am retained by and appear as attorney for the defendant in this action and demand service of

a bill of particulars of the plaintiff's claim herein and a copy of the complaint and all papers in this action upon me, at my office, in the U. S. court and post-office building, in the city of New York.

Yours, ELIHU ROOT,
U. S. Attorney, Attorney for Defendant.

New York, August 1st, 1884.

To Tremain & Tyler, attorneys for plaintiff.

7 [Endorsed:] N. Y. supreme court. David Richmond *versus* Marshal B. Blake. Notice of appearance. Elihu Root, U. S. attorney, attorney for def't. Service of a copy of the within notice is hereby admitted this day. Dated the 1 day of Aug., 1884. Tremain & Tyler, plaintiff's attorney-. To T. & T., plaintiff's att'ys.

8 The President of the United States of America to the judges of the supreme court of the State of New York, Greet-
[L. S.] ing:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Marshall B. Blake, defendant, by David Richmond, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 16th day of August, 1884, as fully and amply as the same are remaining before you, by whatever manner the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esq., Chief Justice of the Su-
9 preme Court of the United States, the 12th day of August, in the year one thousand eight hundred and eighty-four.

TIMOTHY GRIFFITH, *Clerk.*

ELIHU ROOT,
U. S. Attorney, Attorney for Def't.

I have this day personally served upon the clerk of the supreme court of the State of New York a duplicate of the within writ, at the same time showing the original.

August 15, 1884.

JUE B. ERHARDT,
U. S. Marshall.

[Endorsed:] U. S. circuit court. David Richmond *versus* Marshal B. Blake. Certiorari. Elihu Root U. S. attorney, att'y for def't. I hereby dispute John E. Dowley to serve the within writ. Dated August 12th, 1884. J. B. Erhardt, U. S. marshal. Seal U. S. marshall's office, S. D. N. Y. Received August 12, 1884. U. S. circuit court. Filed Aug. 16th, 1884. Timothy Griffith, clerk.

10 Circuit Court of the United States, Southern District of New York.

DAVID RICHMOND
against
MARSHALL B. BLAKE, as Collector of Internal Revenue in & for the Second Collection District of New York.

David Richmond, the above-named plaintiff, by Tremain & Tyler, his attorneys, complains of Marshal B. Blake, above-named defendant, and thereupon said plaintiff states—

First.

For his first cause of action:

First. At all times hereinafter mentioned said plaintiff was doing business in the city of New York as a stock broker.

Second. That the defendant, during said times, was collector of internal revenue in and for the second collection district of New York.

11 Third. That prior to July 1st, 1881, there was erroneously or illegally assessed against this plaintiff as an alleged banker an internal revenue tax amounting to the sum of one hundred and twenty-five dollars on capital alleged then to be employed by him in the business of banking beyond the average amount invested in United States bonds, or on an amount of estimated deposits of money subject to payment by check or draft or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, alleged to have been with this plaintiff as such banker as aforesaid, or on both such capital and deposits; and thereafter and on or about the 30th day of June, 1881, the said defendant, as such collector as aforesaid, illegally exacted and collected, under protest, from this plaintiff on account of said tax so as aforesaid wrongfully and illegally assessed against this plaintiff said sum of one hundred and thirty-five dollars.

Fourth. That thereafter and on or about the 22nd day of June, 1883, this plaintiff duly made his appeal to the Commissioner of Internal Revenue against said tax and the wrongful collection thereof, according the provisions of law in that regard and the regu-

12 lations of the Secretary of the Treasury established in pursuance thereof, and more than six months has elapsed since said appeal and no decision of the said Commissioner has been had therein.

Fifth. That the sum so exacted and collected as aforesaid has not been repaid to the plaintiff nor has any part thereof, and the same is still due and owing to him.

Second.

And for a second cause of action, realleging as is alleged in the first and second subdivision of the allegation with reference to his first cause of action, this plaintiff further states:

First. That prior to January 1st, 1882, there was erroneously or

illegally assessed against this plaintiff as an alleged banker an internal revenue tax amounting to the sum of one hundred and thirty-eight $\frac{50}{100}$ dollars on capital alleged then to be employed by him in the business of banking beyond the average amount invested in United States bonds, or on an amount of estimated deposits of money subject to payment by check or draft or represented by certificates of deposit or otherwise whenever payable on demand
13 or at some future day alleged to have been with this plaintiff as such banker as aforesaid, or on both such capital and deposits, and thereafter and on or about the 31*th* day of December, 1881, the said defendant, as such collector as aforesaid, illegally exacted and collected, under protest from this plaintiff, on account of said tax, so as aforesaid wrongfully and illegally assessed against this plaintiff, said sum of one hundred and thirty-eight $\frac{50}{100}$ dollars.

Second. That thereafter and on or about the 22nd day of June, 1883, this plaintiff duly made his appeal to the Commissioner of Internal Revenue against said tax and the wrongful collection thereof, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury, established in pursuance thereof, and more than six months has elapsed since said appeal and no decision of the said Commissioner has been had therein.

Third. That the sum so exacted and collected as aforesaid has not been repaid to the plaintiff nor has any part thereof, and the sum is still due and owing to him.

14 Third.

And for a third cause of action, realleging as alleged in the first and second subdivision of the allegation with reference to his first cause of action, this plaintiff further states:

First. That prior to July 1st, 1882, there was erroneously or illegally assessed against this plaintiff, as an alleged banker, an internal revenue tax amounting to the sum of seventy-five dollars on capital alleged then to be employed by him in the business of banking beyond the average amount invested in United States bonds, or on an amount of estimated deposits of money subject to payment on check or draft or represented by certificates of deposit or otherwise, whether payable on demand or at some future day, alleged to have been with this plaintiff as such banker as aforesaid, or on both such capital and deposits; and thereafter and on about the 30th day of June, 1882, the said defendant, as such collector, as aforesaid, illegally exacted and collected, under protest from this plaintiff, on account of said tax so as aforesaid wrongfully and illegally assessed
15 against this plaintiff, said sum of seventy-five dollars.

Second. That thereafter and on or about the 22nd day of June, 1883, this plaintiff duly made his appeal to the Commissioner of Internal Revenue against said tax and the wrongful collection thereof, according to the provision of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, and more than six months has elapsed since said appeal and no decision of the Commissioner had been had therein.

Third. That the sum so exacted and collected as aforesaid has not been repaid to the plaintiff, nor has any part thereof, and the same is still due and owing to him.

Fourth.

And for a fourth cause of action, realleging as is alleged in the first and second subdivisions of the allegations with reference to the first cause of action, this plaintiff further states:

First. That prior to January 1st, 1883, there was erroneously or illegally assessed against this plaintiff as an alleged banker
16 an internal revenue tax, amounting to the sum of seventy-five dollars on capital alleged then to be employed by him in the business of banking beyond the average amount invested in United States bonds or on an amount of estimated deposits of money subject to payment by check or draft or represented by certificates or deposit or otherwise, whether payable on demand or at some future day, alleged to have been with this plaintiff as such banker as aforesaid, or on both capital and deposits; and thereafter and on or about the 30th day of December, 1882, the said defendant, as such collector as aforesaid, illegally exacted and collected, under protest from this plaintiff, on account of said tax, was aforesaid wrongfully and illegally assessed against this plaintiff, the said sum of seventy-five dollars.

Second. That thereafter and on or about the 22nd day of June, 1883, this plaintiff duly made his appeal to the Commissioner of Internal Revenue against said tax and the wrongful collection thereof according to the provisions of law in that regard and the regulations of the Secretary of Treasury established in pursuance thereof, and more than six months has elapsed since said appeal and no
17 decision of the said Commissioner has been had therein.

Third. That the sum so exacted and collected as aforesaid, has not been repaid to the plaintiff nor has any part thereof and the same is still due and owing to him.

Wherefore plaintiff demands judgment against said defendant in the sum of four hundred and *and* thirteen $\frac{50}{100}$ dollars, with interest on one hundred and twenty-five dollars parcel thereof, from June 30th, 1881, and on one hundred and thirty-eight $\frac{50}{100}$ dollars, other parcel thereof from December 31st, 1881, and on seventy-five dollars, other parcel thereof, from June 30, 1882, and on seventy-five dollars, remainder thereof, from December 30th, 1882, besides the costs of this action.

(Signed) TREMAIN & TYLER,
Plaintiff's Attorneys.

18 [Endorsed:] U. S. circuit court, southern district of N. Y. David Richmond *versus* Marshall B. Blake, as collector. Copy. Complaint. Tremain & Tyler, att'ys for pl'ff.

19 Circuit Court of the United States, Southern District of New York.

DAVID RICHMOND
against
MARSHAL B. BLAKE, as Collector of Internal Revenue in and for the Second Collection District of New York.

The defendant above named, by Elihu Root, his attorney, answer-complaint herein, says:

I. That he has no knowledge or information sufficient to form a belief as to the truth of the allegations in the first paragraph of plaintiff's complaint contained and consequently denies the same; but he avers, upon information and belief, that the plaintiff herein at the time mentioned in the complaint conducted a banking business in the city of New York.

II. That he admits the allegation in the second paragraph of plaintiff's complaint contained, to wit, that at the times therein mentioned defendant was collector of internal revenue in and for
20 the second collection district of New York.

III. That he admits that on or about the 30th day of June, 1881, the plaintiff herein paid to him, as collector of internal revenue, the sum of one hundred and twenty-five dollars as a tax due from the plaintiff to the United States.

That on or about the 31st day of December, 1881, the plaintiff herein did pay to him, as collector of internal revenue, the sum of one hundred and twenty-five dollars as a tax due from the plaintiff to the United States.

That on or about the 30th day of June, 1882, the plaintiff herein paid to him, as collector of internal revenue, the sum of seventy-five dollars as a tax due from the plaintiff to the United States.

That on or about the 30th day of December, 1882, the plaintiff herein did pay to him, as collector of internal revenue, the sum of seventy-five — as a tax due from the plaintiff to the United States.

And defendant denies each and every allegation in plaintiff's complaint not herein specifically admitted.

And the defendant, further answering said complaint, as a
21 separate and distinct defence thereto, alleges—

I. That the cause of action stated in the first, second, and third causes of action of plaintiff's complaint herein did not accrue within two years before the commencement of this action.

II. And the defendant, further answering said complaint, as a second separate and distinct defense thereto, alleges that the several appeals claimed by the plaintiff to have been made to the Commissioner of Internal Revenue were not made according to the provisions of law in such case made & provided, in that said appeals were made directly to the Commissioner of Internal Revenue without having been first supported by the affidavit of the deputy collector of the proper district and the certificate of the collector of such district.

III. And the defendant, further answering said complaint, as a

third separate & distinct defense thereto, alleges that the several sums of money alleged in plaintiff's complaint to have been paid to the defendant as collector of internal revenue in and for the second collection district of New York have long since been paid into the Treasury of the United States by the defendant herein.

Wherefore defendant demands that plaintiff's complaint be dismissed with costs.

22 ELIHU ROOT,
U. S. Attorney, Attorney for Def't.

23 [Endorsed:] U. S. circuit court, southern district of New York. David Richmond *versus* Marshal B. Blake. Answer. Elihu Root, U. S. attorney, attorneys for def't. Due service of a copy of the within is admitted. New York, Sept. 15, 1884. Tremain & Tyler, atto'n'ys for pl'ff. To Tremain & Tyler, Esq-., att'ys for pl'ff, 167 Broadway. U. S. circuit court. Filed Sep. 16, 1884. Timothy Griffith, clerk.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Tuesday, the 15th day of December, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Hoyt H. Wheeler, sitting as circuit judge.

DAVID RICHMOND
vs.
MARSHAL B. BLAKE, Collector of Internal Revenue.

Now comes the plaintiff, by Tremain & Tyler, Esqs., his attorneys, and moves the trial of this cause; likewise comes the defendant, by Samuel B. Clarke, Esq., ass't U. S. att'y, his attorney. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of both parties and the argument of counsel the jury, by direction of the court, render a verdict, whereby they find for the defendant.

25 It is ordered that the plaintiff have a *stay* of all proceedings on said verdict for sixty days, within which to prepare and serve a bill of exceptions herein.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

26 United States Circuit Court, Southern Dist. of New York.

DAVID RICHMOND, Plaintiff,
versus
MARSHALL B. BLAKE, Defendant.

The issues in this action having been brought on for trial before the Honorable Hoyt H. Wheeler and a jury, at a stated term of the United States circuit court, held on the third Monday of October, in the year 1885, in the United States court building, at the city of

New York, and the issues having been tried, a verdict rendered for the defendant against the plaintiff on the sixteenth day of December, in the year 1885, now, on motion of Stephen A. Walker, Esq., United States attorney for the southern district of New York, attorney for the defendant:

It is adjudged that the said defendant, Marshall B. Blake, do recover judgment against the said plaintiff, David Richmond, upon the issues in this action.

Judg't signed this 24th day of M'ch, 1886.

JOHN A. SHIELDS,
Deputy Clerk.

27 [Endorsed:] U. S. circuit court, southern district of New York. David Richmond *versus* Marshall B. Blake. Posted. Stephen A. Walker, U. S. attorney, att'y for def't. Due service of a copy of the within is hereby admitted. New York, ——. ——, att'y for pl'f. To $5.95 p'd. 3, 7, '86. U. S. circuit court. Filed March 24, 1886—4. p. m. Timothy Griffith, clerk.

28 *Bill of Exceptions.*

United States Circuit Court, Southern District of New York.

DAVID RICHMOND
against
MARSHAL B. BLAKE, as Collector of Internal Revenue, &c.

The issue in this cause coming on for trial before Hon. Hoyt Wheeler, district judge, sitting as circuit judge, with a jury, at the October term, 1885, of the United States circuit court, plaintiffs being represented by Tremain and Tyler, *their* counsel, and the defendants by the assistant United States attorney, the jury was duly impanelled and sworn and testimony adduced on the part of the plaintiff, as hereinafter stated, and in the course of the trial the said counsel for the plaintiff did take and allege sundry exceptions to the rulings of the court in admitting and excluding testimony and to its charge and directions to the jury and to the refusals of the court to
29 submit the cause to the jury and to give certain instructions to the jury, or any of them, as then and there prayed for by the plaintiffs through *their* counsel, which said exceptions are hereinafter severally and separately set forth.

To maintain the said issues on the part of the plaintiffs, counsel for the said plaintiffs adduced in evidence the following testimony:

MARSHAL B. BLAKE, the defendant, being duly sworn and examined as a witness for the plaintiff, testified:

I am the defendant in this case and was the collector of internal revenue at the time the taxes in question in this suit were assessed upon Mr. David Richmond. I did not make that assessment; it was made by the Commissioner of Internal Revenue.

Q. Will you please state the amounts that were paid by Mr. Richmond?

Defendant's counsel here conceded that the amounts stated in the complaint were the correct amounts and the dates of the payments were correctly stated.

A. Those amounts were paid to me as collector and deposited in the Treasury.

30 My impression is that the tax is one twenty-fourth of one per cent. a month; I didn't calculate it; I think it was upon capital. I have had the claim of Mr. David Richmond before me, together with other claims, they having been referred to me by the Commissioner of Internal Revenue. I mean claims for refunding sent to me by the commissioner in August, 1884. In the usual course of business, when those claims are decided I receive notice of the decision by the commissioner. I don't remember that I have received any notice of decision in this case.

Being cross-examined by counsel for the defendant witness stated: I saw the appeal to the commissioner made by the plaintiff in this case in August, 1884.

DAVID RICHMOND, the plaintiff, being duly sworn and examined, testified:

My place of business is 33 New street; during the years 1881 and 1882 and 1880 my business was that of stock broker; according to my understanding that is a well-defined avocation; it consisted in buying and selling stocks for customers and carrying them by borrowing money for customers to carry those stocks on; that

31 occupation was carried on by a great many members of the New York stock exchange; there are some bankers in the stock exchange, but the business carried on there as a rule is that of stock brokers.

Q. Do you know whether or not the business of banking is a well-defined avocation?

Defendant's counsel objected and the court sustained the objection and the plaintiff's counsel duly excepted.

Q. Does the business of stock brokerage, as you have described it, necessarily require any capital?

DEFENDANT'S COUNSEL: I object; the question is not here as to whether this business requires any capital, but what the plaintiff had in his business.

THE COURT: He has told where and what his business is, as he construes it. Now, what is necessary or supposed to be necessary isn't of any account. What does he do?

PLAINTIFF'S COUNSEL: He has described what he does. Now I want to see if he used any capital in the business.

THE COURT: You can ask him if he has money employed in the business.

Q. Did you have any capital employed in the business of stock broker?

A. I did.

Q. Did you have any capital employed in the business of banking?

32 DEFENDANT'S COUNSEL: I object. In the first place, I object to the question as leading; and, second place, I object because it calls for the witness' conclusion.

The COURT: We will admit what he did. He need not answer.

Plaintiff's counsel excepted.

Q. Did you have any capital employed in any other business except stock brokerage?

DEFENDANT'S COUNSEL: To that I object. The same objection holds good there.

Objection sustained.

Plaintiff's counsel excepted.

Q. Were you engaged in any other business except that of stock broker at that time?

A. None whatever.

DEFENDANT'S COUNSEL: Your honor passed upon that question a moment ago, and counsel has taken advantage. I move to strike out the question and answer.

PLAINTIFF'S COUNSEL: Upon what ground?

DEFENDANT'S COUNSEL: On the ground that it is calling for the witness' conclusion. That is this very point in issue—the very point we are endeavoring to determine in this case.

The COURT: What his conclusion is or what he says it is would be of no account whatever to the jury. We want the fact—
33 what he did, not what he thinks he did.

PLAINTIFF'S COUNSEL: I want to negative any possibility that he was in two or three businesses at the same time, and I want to show that negative by appropriate testimony.

The COURT: You may understand that the question is excluded.

Plaintiff's counsel excepted.

The defendant admits that the payments were made of the amounts stated in the complaint and that the payments were made on capital.

Being cross-examined by defendant's counsel, witness stated:

My place of business was at 33 New street, on the ground floor, and occupied a space of about 18 by 60 feet. It is divided by a partition about seven feet high in front of the desks, but the back room was never shut off from the front room at all. The partition was placed in the office for the convenience of my clerks and myself; my clerks were sometimes on one side of the partition and sometimes on the other; any one entering from the street would be met by an open door in the partition; the street door was opened
34 by an ordinary latch any one could enter; this would lead them into the front office, and would lead them thence into he passage-way, outside of that partition I speak of. The front office

was used by both clerks and customers; clerks would talk there with customers and receive orders or talk over other matters. They were sometimes behind and sometimes in front of the partition; they never talked to customers through the openings in the partition; they would go right up to the customers and talk to them. When the clerks were at work behind the partition and customers came in they might talk to them over a wooden rail or might go outside; there was no general rule about that; the customers would sometimes walk behind this rail, sometimes stay in front.

Q. Now, this front office you describe as being occupied by you—was that accessible through the front door so that any one having stocks or bonds for sale might enter and transact any business there?

A. I might not accept an order from a person I didn't know.

Q. I simply asked you if it were possible for the general public to come into that place, not what you would do.

Q. (repeated.) Now, this front office you describe as being occupied by you, was that accessible to the public through the front
35 door so that any one having stocks or bonds for sale might enter and transact any business there?

A. Can I answer that in my own way?

Q. No; you will answer the question according to the fact.

A. As I do my business, if a stranger comes in and I don't know him and the clerk don't know him he would be put out.

The COURT: He wants to know if you had a public office for people to come in?

Answer. If a person came in whom I didn't know and the clerks didn't know——

PLAINTIFF'S COUNSEL: Anybody could walk into the office and walk out again?

The COURT: Was it a public office for those who chose to come in?

Answer. But if a man was not known he would be asked——

PLAINTIFF'S COUNSEL: The question calls for an answer as to whether the general public could come in there with bonds, etc., and transact business. Now, the witness has said that if the general public came in there and was not known that they would be put out.

The COURT: Stop right there and get just what he means; the inquiry is not as to what is done when they get in, but it is as to whether that is kept as an open place where people can come in through the door and do business there?

36 Answer. The people who had business with me could come in, naturally.

Continuing, witness testified:

I have a sign on the door which has been there four or five years. It reads, "David Richmond, stock broker." If a customer came into my office to buy stock he would give me an order and hand me a margin to protect me against loss for the purchase; then the next day when the stock was delivered to me I would borrow money to pay for it. This is a regular purchase; sometimes customers pay

in full for stock. We seldom book orders; we buy stock on the stock board, sometimes receiving the margin and sometimes not. We receive certificates purchased on the stock board as a rule next day. It is sent to my office by the seller, and he receives a check in *in* payment drawn on the Leathers Manufacturers' Bank against a desposit I keep there; that deposit is, as a rule, my own money.

Q. Your capital?

A. A portion of it; not always.

Q. How much capital did you have in your business at that time?

A. I have forgotten; it was nothing like $300,000; it ranged from $30,000 to $50,000. It was on that capital that I made the return for taxation; I had in business that amount; it was on that return that I was taxed one twenty-fourth of one per cent. per month, and it is to recover back that tax that this suit is brought.

37 Q. Now, to return to this transaction, I understand you to say you drew your check to pay for this stock purchased at a day previous, pursuant to this order made by your customer; that check was drawn on your bank in which you kept on deposit your capital?

A. I say a portion of my capital, or maybe more than my capital; there might have been money of my customers there in my name. As a rule my capital was not all in use, some of it was in the bank.

Q. If your capital was all in use, then a draft would be made against what—moneys borrowed?

A. We had to have some of the capital in the bank.

Q. Assuming that it was all in use?

A. It couldn't be if some of it had to be in the bank.

Q. Why?

A. Because you have to have a bank balance to draw your check against it.

Q. Couldn't you borrow money and place it in the bank?

Ans. Borrow that money on your customer's stock for your customer.

Q. Couldn't you borrow that money yourself?

A. Borrow it; yes, for my customers—on my customers' stocks.

Q. I am asking you about your own account.

A. If I had stocks, I could.

Q. You could borrow money and put it in the bank?

A. Yes; if I had good stocks—proper stocks.

Q. As a matter of fact, did you not get discounts at the bank during this period of time?

A. I have had money borrowed at the *at the* bank dur-

38 ing that time on stocks; but mainly——

Q. Never mind; that is an answer.

A. Almost entirely on customers' stock.

PLAINTIFF'S COUNSEL: No discount?

The WITNESS: No discount, but on loans from the bank. I never had a note discounted in my life.

DEFENDANT'S COUNSEL: I ask to have that portion of the witness' answer stricken out.

The COURT: I don't perceive but what the witness is answering

fairly. I don't perceive that he volunteers anything. I understand him to say he borrowed money and put up his customers' stock and, if need be, stock of his own.

The WITNESS: Sometimes.

Q. When would you deliver this stock to your customer who had ordered it?

A. Might not deliver it to him at all; he might sell it out the next day.

Q. He might sell it out the next day?

A. Yes.

Q. Then, in the meantime, you have only received from your customer, first, an order to purchase the stock, and, second, a margin to secure you, and in the meantime you have purchased the stock, drawn your check against your moneys in the bank to pay for them?

A. I then borrowed money to make the bank balance up again.

Q. You have borrowed money?

A. I may have done that meantime.

39 Q. Or you may not, if your own capital was large enough?

A. But the chances are I would not have enough. As a rule, when the stock purchased was delivered to my cashier we would draw the check. If my bank balance was lower than it should be I would borrow money sometimes, but not always, by hypothecation of the stock purchased in order to make up the proper amount again. I might use that stock or I might use other stock to borrow the money to keep the bank balance up, but I would not go to work and use that stock before I paid for it. The check is paid the next day, as it has to come through the clearing-house first. After the stock was received sometimes we would borrow money on it in the course of half an hour; sometimes it would lie in the drawer for a week and then borrow money on it.

Q. Do you have a drawer in which you keep stocks that come into the office?

A. Not all of them; we keep the bulk of them. Sometimes that stock might be sold by the customer and would not go into the drawer; the sale might be simultaneous; he might tell me if it went up one point to sell it right out again. If it was not

40 sold I presume it was put in the drawer for the time being. It might be there one or two days or a week. If we bought a stock for a customer that was not held in very high repute by the banks we might use it to borrow on or might not.

Q. In that event you would use the stock that you found in the drawer, irrespective of who the owner was?

A. Not at all; not necessarily.

Q. Did you not state that you sometimes used the stocks of other customers for the purpose of raising money?

A. Stocks belonging to myself.

Q. Then you do not always use the stock which is purchased for the purpose of obtaining money to make good your account?

A. Generally speaking, we do.

Q. Is it yes or no; do you or do you not?

DEFENDANT'S COUNSEL: I don't think that is an answer to the question, if the court please.

The WITNESS: I cannot say yes or no, because we don't do it in every individual case; I say as a rule we do.

The COURT: He asked you if you did always.

The WITNESS: I cannot say always; no, sir.

We have no fixed time when the customer pays for the balance over and above the margin on the price of the stock; sometimes he does pay, and sometimes he doesn't; sometimes he sells it
41 out *out* again; as a rule, if the stock is delivered to him, he pays for it then; sometimes sooner; sometimes it is delivered to him, sometimes not; sometimes he pays for it at once and sometimes not; at the time of the purchase he sometimes pays a percentage, and sometimes merely hands me over stocks and bonds as margin.

"Margin" is money put up to secure me against loss for stock which I buy for my customers at a certain price if I should sustain loss.

Q. Is not a margin a certain percentage of the actual market value of the stock purchased?

A. As a rule it is; that is the only way I look at it; a margin may be either cash or its equivalent in some security.

Q. Now, then, having received a margin from your customer, either consisting of cash or certain percentage or of bonds or of other securities equal in value to this cash percentage, you make the purchase pursuant to his order of a certain stock; having made the purchase, when do you deliver the stock to him?

—. ——.

Q. Out of what funds or from what resources are funds against which this check is drawn derived?

42 PLAINTIFF'S COUNSEL: We object to that as having been answered.

The COURT: He said his fund in the bank.

Q. Your capital?

The COURT: His money.

The WITNESS: Of capital of my own.

Q. It is your money, I understand?

PLAINTIFF'S COUNSEL: I object to that; it has been answered; of course it is his money.

DEFENDANT'S COUNSEL: I want the witness's statement; I don't want Gen. Tremain to state it.

Q. When did you receive back from your customer moneys for stock you purchased?

A. Well, you can't tell; sometimes the customer, as I said, may sell the other right out again; sometimes he may keep them for a month, sometimes six months, and sometimes a year; no time about that.

Q. Do you keep an open account with your customer?

A. Yes.

Q. On your ledger?
A. Yes.
Q. What does that account show?

PLAINTIFF'S COUNSEL: We object to that as immaterial, sir. Now, the way a stock broker——

DEFENDANT'S COUNSEL: I don't want to know from you, but the stock broker.

PLAINTIFF'S COUNSEL: The way a stock broker or any other
43 party keeps his books of account as long as there is no statu-e regulating the method of keeping the books, as there is concerning tobacco and distillers of liquor, for the purpose of ascertaining the taxes imposed—the way that anybody keeps books of account is utterly inconsequential and is utterly immaterial.

The COURT: He may let us know if it'- his custom to keep an account with his customer.

PLAINTIFF'S COUNSEL: I take the benefit of an exception.

The COURT: He may answer the question as to whether he opens an account with his customer.

A. I do.
Q. Do you credit him with the amount of the margin which you receive?

PLAINTIFF'S COUNSEL: I object to that.

The COURT: You can answer.

PLAINTIFF'S COUNSEL: I take the benefit of an exception as irrelevant and incompetent.

A. We credit him with the amount; if it is money he received credit for it; if it is securities he receives credit, of course, for that.
Q. Do you charge him with the cost price of the stock purchased pursuant to his order?

PLAINTIFF'S COUNSEL: I object to that as immaterial, irrelevant, and incompetent.

The COURT: He may answer.

44 A. I do.
Q. And do you charge him with the interest on the difference between the cost price of the stocks and the amount of his margin?
A. I do.
Q. How is your difference settled?

PLAINTIFF'S COUNSEL: We object to that as already answered and as irrelevant, incompetent, and immaterial.

The COURT: He may answer.

PLAINTIFF'S COUNSEL: We take the benefit of an exception.

A. He receives interest on the amount placed to his credit and is charged interest on the amount placed to his debit, which is practically the same. You asked me the way in which it is done, I understand?
Q. Then, instead of deducting the lesser number from the larger number and then calculating the interest charge to be made to the

customer, you make two calculations, debiting one and crediting the other?

A. Exactly so.

Q. And that interest is charged against him up to what time?

A. No stated time; it depends upon whether the stock is sold or not, or w-ether it is paid for afterwards by him—taken up.

Q. It is charged to him up to the time that he either closes out his account or——

A. Settled in full.

Q. That may be done in two ways; either by selling out the stock which you hold or by paying the amount charged against
45 him on your books as the purchase-money?

A. Yes.

Q. At what rate of interest were your customers charged for these debits against them during the year- 1880, 1881, and 1882?

To which question plaintiff's counsel objected as immaterial, irrelevant, and incompetent; which objection the court overruled, and plaintiff's counsel duly excepted.

A. Most of the time at the rate of six per cent., but if we had to pay large prices for borrowing money we had to charge extra rates on that account; the rate was never, to my knowledge, less tha/ six per cent.; but we did not always charge a higher rate simply because we paid a higher rate. In the spring of 1880 or 1881 money was very active, and at that time we charged more—that was extra. We borrowed money from different banks and bankers; sometimes from individuals outside or sometimes possibly from brokers who happened to have a balance more than they wanted overnight. As a rule, the rate of interest was above four per cent.

Q. Now, you have described the manner of doing business on orders to purchase, won't you please tell the jury about the manner of doing business when you receive orders to sell?

46 A. Sometimes a customer may write us from the country to sell stock, and then he says he will forward it by mail when sold; another time he may enclose it with the order; another time a customer will come into the office with a certificate and say, "Sell this;" another time he may come in and say, "Sell this and I will deliver the certificate to-morrow," and so on. I sell the stock, and when the time to deliver it to the broker or buyer of the stock arrives I deliver it and receive his check for it. If the seller wants the money I give it to him. If he does not want it he may leave the money there overnight or two or three days, but that would be only incidental to the business. It isn't my line of business to receive money in that way; it is an incident of the business. When it is left with me the customer in the country does not make a draft on me; I almost invariable send him my own check.

Q. And sometimes otherwise?

A. A customer never drew on me for that sum; never.

Q. Speaking of a customer who comes into your office and leaves an amount there in that way, say for a day or two or a week, does he draw his check on you for that amount?

A. No; never for that kind of favor; never; never had an instance of that kind in my life.

The COURT: You don't hold any funds to check?

47 The WITNESS: Never, as a rule. We very rarely have checks drawn against us by our customer; if we ever did it was not in the manner of the general business at all; it was an exceptional thing. No man who ever had stock for sale had drawn the full amount of purchase on that stock—drawn a draft; he might have drawn a few hundred dollars—one or two hundred dollars; something like that.

Q. How as to the sale of stock? A customer comes in with a certificate and asks you to sell it; describe the entire transaction.

A. I go up to the board and sell it. I pay him sometimes that day, sometimes the next, but very rarely indeed when he delivers the certificate of stock. I keep the certificate in the office until I go to the board to sell stock; sometimes until the next day; sometimes I borrow money on it overnight; I keep it in the drawer or in the safe or in the desk; it is paid for with money in the bank to my credit by my personal check.

In the case of the country customer who sends an order to sell, stating that he will forward the certificate of stock by mail or as soon as required, I sell the stock and notify him of the sale; then he probably sends me the certificate. I don't send him the

48 money for that certificate before I receive it. This order to sell would probably be sent to my place of business.

In the case of a "short sale" it was just the reverse of the purchase business; I sell it, and when the time comes for delivery I borrow the stock of another broker.

Q. You tell your broker friend or business acquaintance that you want to get one hundred shares of Lake Shore, for instance?

PLAINTIFF'S COUNSEL: Want to borrow.

DEFENDANT'S COUNSEL: Well, he has got to get it.

PLAINTIFF'S COUNSEL: That is not what he said; he said borrow.

A. I would tell a friend that I wanted to borrow one hundred shares of Lake Shore, and he says, "Al- right; you can have it." He sends it down to my office in a short time, and I pay him for it; I pay him the market price with money to my credit in the bank; the customer who has ordered this short sale may have sent me money or may not have; he may have given me stock as margin or other security.

Q. Is he credited with that amount of margin?

Plaintiff's counsel here objected to the question.

49 The COURT: We will take his course of proceedure.

Plaintiff's counsel then excepted.

Q. He is credited on that amount of margin, is he?

A. He is when we get it.

Q. On your books is he debited with anything?

Plaintiff's counsel here objected. Objection overruled. Plaintiff's counsel excepted.

A. He is not. Then he gets a credit for the amount of stock that is sold, the amount of money received for it, and we charge him for whatever is paid for the use of the stock; the general custom is to charge for the use of the stock; stocks might be running flat; he is credited with the interest on his margin; the transaction might be closed at any time by the purchase of the stock for and on account of the customer. On our books he would be charged with the cost of the stock as bought on the board with commission. Our letting the account stand would depend altogether on the price the stock was bought at and the price it was sold at.

Q. Assuming that there had been an advance in the stock market pending the borrowing and the sale pursuant to the original
50 order and the purchase made for the purpose of closing the transaction, how would the books stand?

The WITNESS: The customer might have bought stock at another office and bring it in. You cannot figure on these things, except on the actual facts at the time. Suppose, for instance, the stocks was sold for ninety and bought back for ninety-five, that would show a loss of about $525, on the supposition that nothing was paid for the use of the stock. His margin would then be encroached upon by just the amount of the difference between the original price sold for and the price paid by us in closing it and the commissions and whatever we had to pay for the use of the stock. If, on the contrary, there had been a profit to the customer, we would be in his debt, then the amount of the margin deposited and the amount of his profit; we would have that to his credit; almost invariably he would be given a check for it; if he saw fit to make his draft upon us, that could be done, of course, but they do not do it; if he did make his draft I should honor it.

During the years 1880, 1881, 1882 I think I have loaned stock in the stock board, either customers' stock or my own, sometimes both, to various brokers; for instance, if I wanted to borrow money I
51 could borrow it to a better advantage by loaning the stock than by hypothecating the stock in that loan—make a contract to loan the stock on the exchange, then have it delivered by one of my boys to the man whom I loaned it to.

Q. Where would you take it from?

A. From my office.

Q. Your boy would take it from your office to the person to whom you had made the loan?

A. Yes, sir; and get that man's check for the loan at the market price.

Q. What did you do with the check?

A. Placed it to my credit in the bank.

Q. You would bring it back to the office first, wouldn't you?

A. Yes.

Q. And then put it with other checks?

A. Yes, sir.

Q. You make up your deposit ticket and send it to bank?

A. Yes, sir.

Q. And that, with many so received by you, would go towards making up your bank credit, against which your checks were drawn for payments of stocks purchased or for advances made on stocks borrowed?

A. The regular line of business; yes.

Q. Now, when the person to whom you have loaned this stock gets through with it how would he send it back to you?

Ans. He would notify me in the morning that he was going to return it to me. He would just reverse the transaction and I would pay him for it.

Q. He would present it to one if your clerks in the office?

A. Yes.

52 Q. And your book-keeper or cashier would draw a check for it?

A. Yes.

Q. That check would be passed out to the person who bought the stocks?

A. Yes, sir; that is right.

Q. That would be the check against this man?

A. Just the same as buying the stocks; just for general accounts; yes. When I wanted to borrow any money, say I found myself short, I would go to the stock exchange, or to my bank, or to other banks, or to other individuals outside, and as collaterals I used stocks and bonds or securities belonging to myself or to customers; anything I had a right to use. Where they were sent to me for sale in my possession I used them in the regular business.

Being redirectly examined by plaintiff's counsel, witness testified:

Borrowing stock or loaning stock is equivalent to borrowing or loaning money; sometimes it is; but some borrow cheaper in that way. The stocks loaned are generally stocks for which there is a special demand. There is a daily borrowing and loaning of stocks on the stock exchange. When I loan stocks and receive money and the stocks are subsequently returned to me I pay money back. The checks are for the same amount, with interest or

53 with deductions made for charges or for the use of the stock, whatever it may be. There is no regular buying and selling commissions in such a transaction, but the stock may be in great demand, and they loan it for, say, twenty-five dollars 100 shares overnight. It depends on the demand for that particular stock at the time of loaning. The stocks that I loaned in that way are those I had a right to loan or to dispose of. There were some cases in which there was stock that I was to hold absolutely and yet had not that right.

Q. Is it a part of your general business or was it during the period of these taxes for customers to draw on you, except when there was money, as the result of closing a transaction to their credit?

A. Not as a rule; very seldom. When such drafts were made they were almost the result of previous arrangements or notification.

A "short sale" is a customary thing; it contemplates a decline in the market, and is a transaction with a view to profit on that side of the market. It did not often happen in the conduct of my business in 1880–1882 for a customer to bring certificates into my office and ask me to sell them; it was an exceptional thing. I gen-
54 erally paid for the stocks thus sold for my customers after they were sold. If I should pay to-day for stocks sold to-day, deliverable to-morrow—that is, pay the whole value, less my commissions, and the man to whom I sold to-morrow should happen to fail, and my customer disappeared, I should have to look to myself for the difference. In that way I would be the principal.

Q. Now, did — ever happen in your business, during that period, that you merely paid for stocks immediately upon being ordered by the customer to sell it?

Ans. I can't remember that.

Q. Was that a usual thing during that time?

A. It could not have been a usual thing or I should have re-m-bered it most certainly. I occasionally do business for other brokers; did not do much during this period; I don't do as much of that as a great many do; many make a specialty of it.

Q. Do a great many brokers do business for banking-houses?

DEFENDANT'S COUNSEL: I object to that.

A. I have done business for houses in other lines of pursuit than mine; it is a common thing in my lines of business as conducted in this city, but I don't do so much of it as I do for individ-
55 uals. Drexel, Morgan & Co. and similar firms employ persons in my line of business for the purchase and sale of stocks to a large extent. These persons are called in Wall street bankers.

Q. Is it a fact that there is a class of houses known as banking-houses in the mercantile community?

DEFENDANT'S COUNSEL: I think that is objectionable.

The COURT: We will leave that out. This is the idea controlling my mind—that this statute is not by its terms made applicable to banks and bankers only, but it goes on and specifies those who do so and so shall be within this statu-e, so that what they are known as would not be any guide; so we are not trying an importer's case or trade names.

PLAINTIFF'S COUNSEL: In section 3408 we find the expression which is the subject-matter of the tax and the only — where the subject-matter is described exactly. The expression is "the capital employed in the business of banking." Now, it is true that in another section those who are bankers are more or less described. There is no description anywhere of the business of banking, and the question might become a pertinent one in this case
56 whet-er or no there was an avocation that was well defined as a business by itself that was accepted in the commercial world as the "business of banking" in order that the courts might apply a tax upon the capital that was actually employed in the

business of banking, and it is upon that topic that it occurred to us in the preparation of this case, if not with this witness, certainly at some proper stage in the cause, that testimony should be received to show that in the commercial community the business of banking was an identifiable occupation and avocation, but that it shall be described by one witness nor by two; not that the statutes shall be so far illuminated by testimony as to enable the jury to determine whether, according to the general tenor of the commercial world, the particular avocation which has been taxed—this plaintiff's avocation—was not then the class of business recognized as banking. Now, we wish to offer some testimony on that subject, but by this witness it might not have been competent until this cross-examination. After this cross-examination, as it occurs to us, we are entitled to enter upon that enquiry now.

57 The COURT: I understood you, upon your opening, to claim that, although the plaintiff might appear to be a banker under the first chapter, still he would not be taxable on his capital unless it was capital employed in the business of banking according to the trade understanding. If I understood you aright, I understood you to make that point. As I understand you now, you desire to bring up testimony.

PLAINTIFF'S COUNSEL: In my opening I claimed on two grounds that even though he was a banker within the description of the statute that even then his capital was not employed in the business of banking.

The COURT: I was only mentioning one ground; he wasn't a banker at all; but if he was within this class, still he was not within the ordinary acceptation, and therefore his capital should not be taxable. Although he was, within the meaning of the statute, a banker, I understand your point; I don't think your view is one that I should desire to adopt; still I desire that you have every opportunity to raise any fair question on the statutes.

Perhaps you will raise it as well if it is excluded as if it is received; and I therefore exclude the testimony, which will save you the question.

58 PLAINTIFF'S COUNSEL: I take the benefit of an exception.

Q. In this business that is done for houses in other lines of business the stocks are received and you are indemnified from loss in the method you have described?

A. Yes; these transactions of purchase and sale occur in the stock board as a rule. I have never known anything under the name of "discounts" done in my office. I don't get discounts at the bank. When stocks come in that I have purchased I draw my check—the check is drawn on the money of checks deposited that day on other banks—that is, checks for the sale of stocks delivered to-day and sold the day before. I may have made three or four different deposits. The stocks are delivered before quarter past two. I give the checks for them as the stocks come in—that is, as a rule, before quarter past two. The checks are almost always given before quarter past two. In a rare case it may be later. As a rule they

are not certified. I do not always have all the money in the bank that is represented by all the checks that are drawn; far from it. To make our account good before three o'clock we have checks coming in, and we keep putting them in. It is the course of
59 business to make deposits, so that our bank account shall be good before three o'clock. If we find we are short of money we usually borrow. As a matter of fact, during the period from 1880 to 1882, our house were always borrowers. I borrowed much more money than I loaned during that period all the time. When we receive a certificate or a security as a margin there is no entry in dollars and cents made on our books. We simply enter the receipt of the certificate, that is all. The customer is simply given credit for the certificate, not for any sum of money. The rate of margin taken from different customers varies very greatly, depending on the responsibility of the customer sometimes, and sometimes on the ability of the broker to borrow on a particular stock, and sometimes on the competency of the purchaser. It is not customary for customers to talk with the clerks through the small openings in the partition. The conversation connected with the business is usually carried on in the front part of the room in the back office. We have a ticker there which customers can look at. Some of them get there mail there, and we have writing materials, etc., for
60 them. We sometimes actually sell stock on an order to sell before having received the certificate from our customer for that purpose. It might happen that we borrowed the stock for delivery, but this is not customary. When we receive an order to sell, if we know the customer, we proceed to execute that order; that is the usual course of business. I can generally tell from the nature of my customers whether an order for sale which I receive is a short sale or a genuine sale; but I can only judge of this inferentially.

Recross by defendant's counsel:

Stocks are very rarely delivered at the stock exchange; they are generally delivered at the office of the purchaser or the seller. A delivery of stock purchased by me would almost always be made in my office. I say almost always, and I will explain the reason why. Sometimes, at half-past two, the stock is not delivered at my office, and my customer is anxious to get the stock, and I want to get the stock in; I buy of the broker under the rule; at half-past two to twenty-three minutes to three he can hand in that stock to me in the room, and I give him a receipt for the time being and he hands the receipt in at my office and is paid. That is only an exceptional thing, of course.

61 Q. This transaction, which takes place at the stock exchange, is nothing more than an agreement between yourself and some one else?

Ans. That is it, the fulfilling of the contract where it is filled in time. As a general rule in my business, payment for the stock itself is made at my office or on 'change. If I should find, at quarter to two, that I was going to have a balance left over my requirements

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for that day I would go up to the stock exchange and probably loan it at current rates; when it was loaned the man who borrowed it would send the certificate down to my office and I would give him a check.

By plaintiff's counsel:

Q. That money was in the bank, but you credit that as the result of your previous transaction?
A. Yes.
Q. Might have been borrowed or not?
A. That is exactly so.

By defendant's counsel:

Q. Might have been your capital?
A. Not very much.

By plaintiff's counsel:

Q. Is it a part of your business to advance any money to the customer?

DEFENDANT'S COUNSEL: I object; not what is his business—what did he do?

62 THE COURT: Do you expect him to answer any differently?

PLAINTIFF'S COUNSEL: I forgot to ask him about that at the time.

THE COURT: You may ask him whether he has any other business other than that he has described.

DEFENDANT'S COUNSEL: Carried on at this place or any other place.

PLAINTIFF'S COUNSEL: That is what I would like to have done, but I understood your honor to exclude that.

By plaintiff's counsel:

Q. Did you carry on any other business at the place you have described except the business you have already described?
A. That is the way I said it.
Q. Is it or not the fact that many members of the stock exchange have no office whatever of their own?

Objected to.

PLAINTIFF'S COUNSEL: It is part of the definition of the broker; we are to explore what is a broker.

THE COURT: He has nothing to do with what is a broker.

PLAINTIFF'S COUNSEL: The old statutes speak of brokers, and the question is whether a broker is or is not a separate avocation.

THE COURT: The old statutes has been repealed, and if this man is taxable as a banker it is all right whether he was a broker

63 or not. If he wasn't actually a banker, why, of course, he has been wronged.

Objection sustained, and plaintiff's counsel duly excepted.

CLINTON G. COLGATE, being duly sworn and examined as a witness for the plaintiff, testified:

By plaintiff's counsel:

Q. Do you remember the occurrence of receiving a claim from Mr. Richmond and doing something with respect to it, and sending it to Washington?

A. I do. I made out the claims of David Richmond and received them duly sworn to. I gave it to Mr. Randolph, clerk in Tremain & Tyler's office, with the instructions to give it to the Commissioner of Internal Revenue, at Washington, to go directly there and hand them to him.

Q. Are you familiar with the usages in the conduct of the stock business in the city of New York; and, if so, from what causes and experiences?

DEFENDANT'S COUNSEL: I object. I take it that it is immaterial what the general usage is among stock brokers.

The COURT: What he knows; we will take that.

PLAINTIFF'S COUNSEL: The point in this inquiry was to adduce testimony to show what the general business was of stock
64 brokers as carried on in the city of New York and as carried on in this country for many years. I wish to show the condition of the business at the time of the legislation which has recognized this as a taxable avocation in distinction from any other avocation, and in that view, and the reason I cautioned the witness not to answer was that your honor might get that exact point to be ruled upon.

The COURT: That would not help us in this inquiry, according to my view; therefore we will exclude it.

PLAINTIFF'S COUNSEL: Will your honor give me the benefit of an offer to show what was in fact the general avocation of stock brokers in the city of New York from 1870 and in this country; but I think I ought to go back further than that; I think I ought to go to 1865?

The court refused to receive such evidence, and plaintiff's counsel duly excepted to its exclusion.

Plaintiff's counsel then asked:

Q. Do you know what the usage of the Internal Revenue Department was prior to June 22nd, 1874, respecting the classification of persons doing business as stock brokers and the classification of persons doing business as bankers or who had capital employed in the business of banking?

65 To testimony under this inquiry defendant's counsel objected; which objection the court sustained. To this ruling plaintiff's counsel duly excepted and claimed the right to present the question as to whether the usage in the business was not a proper element to be considered in connection with the legislation of 1874.

Plaintiffs then offered evidence tending to show that the claim of

the plaintiff for the alleged excessive taxes mentioned in the complaint was presented to the Commissioner of Internal Revenue on the 20th day of June, 1883, having theretofore been verified by the claimant for that purpose, & the witness who presented the claims to the Commissioner on that day was examined and testified and identified the form upon which the claim was made out.

The court overruled the objections of the defendant's counsel that no sufficient appeal to the Commissioner had been taken pursuant to the statute, and for the purposes of this case held that the claim was presented to the Commissioner according to law and suit thereupon reasonably instituted.

The defendant himself had meantime been called as a
66 witness and testified that he had had the claim before him in August, 1884, and that, in the usual course of business, when these claims are decided by the Commissioner I receive notice of the decision, and in this case I have received no such notice.

The foregoing compromises all of that evidence that was adduced on the part of the plaintiff.

The defendant offered no evidence, but moved the court to instruct the jury to find a verdict for the defendant, which said motion of — the court granted, and the counsel for plaintiff duly excepted thereto.

Plaintiff's counsel had requested the court to submit the evidence to the jury, which request was refused, and counsel for the plaintiff duly excepted.

Plaintiff's counsel also requested the court to submit the following question to the jury, namely:

"Did the plaintiff have a place of business where credits were opened by the deposit or collection of money subject to be paid or remitted upon draft, check, or order, and was the capital on which he was taxed employed in such a business?"

This request the court refused and plaintiff's counsel duly excepted.

67 Plaintiff's counsel also requested the court to submit the following question to the jury, namely:

"Did the plaintiff have a place of business where money was advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, and was the capital on which he was taxed employed in such a business?"

This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court to submit the following question to the jury, namely:

"Did the plaintiff have a place of business where stocks, bonds, bullion, bill- of exchange, or promissory notes were received for discount or for sale, and was the capital on which he was taxed employed in such a business?"

This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court to submit the following question to the jury, namely:

"In the general business of the plaintiff, which he calls that of stock broker, was the capital on which he was taxed employed in the business of banking?"

68 This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"In answering the foregoing questions the jury will have regard for the general business of the plaintiff and its general character and methods, and not exclusively to its incidents and exceptional occurrences."

This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"That which is taxed is the capital employed in the business as it is generally carried on and not as respects its exceptional features, and if the jury are satisfied that the plaintiff's business in its general characteristics is not aptly described in the foregoing questions they will render a verdict in plaintiff's favor."

This the court refused to do and plaintiff's counsel duly excepted.

69 Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"To be taxable plaintiff's capital must have been employed in a general business and in a place of business in one or more of the ways indicated in the first three questions, and not in a business to which one of those ways or a part of it is incidental."

This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"The jury are at liberty to regard *to regard* the circumstance that Congress has by legislation recognized the distinction between bankers as such, and brokers as such, and bankers doing business as brokers."

This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"If the business of stock brokerage is a distinct and well-

70 defined avocation, not fairly described by the foregoing questions or all or any of them, and the plaintiff's business as a stock broker, according to the descriptions in testimony, be of that distinctive character, then the capital employed in such a separate occupation is not subject to the tax imposed, and plaintiff is entitled to recover."

This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"The jury are to determine whether plaintiff had any capital employed in the business of banking, as that term is usually understood in trade and commerce."

This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"The jury are to determine whether plaintiff's business in which he engaged his capital was or was not the loaning or advancing money on stocks, bonds, bullion, bills of exchange, or prom-
71 issory notes, and in answering this question will consider whether transactions of this character were exceptional and incidental or were substantial features of plaintiff's business to which he devoted more or less of his capital."

This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"The Government was not entitled to a tax on any sums as capital which were not in truth and fact set apart and designed by plaintiff and by him actually employed in the business of banking as above described."

This the court refused to do and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"The phrase capital actually employed in the business of banking must be given its fair and ordinary signification, and therefore the jury must give it such application to the case at bar as is con-
72 sistent with its ordinary use; as, for instance, as applied to banking corporations."

This the court refused to do, and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"The jury must determine what was the ~~defendant's~~ plaintiff's capital and what part thereof, if any, was fairly employed in banking business."

This the court refused to do, and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"In taxing capital employed in the business of banking the law does not discriminate between corporations and associations and individual bankers or firms. It is the intention and organization of the business and its actual conduct and the capital that is engaged in it that is to control the tax. (There is no difference in the business of banking as conducted by individuals from the business as conducted by corporations which would warrant any different meaning to be given to the term capital in the two cases. Field, J., in 21 Wall., 286.)"

73

This the court refused to do, and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"Parties may do business as bankers and may also engage in other transactions without enlarging their liability to be taxed as bankers."

This the court refused to do, and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"In such cases it is only the amount established to the jury's satisfaction to be the capital employed in the separate banking business that forms the subject-matter for taxation."

This the court refused to do, and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

74

"A party may do business as banking and something else and his capital employed in this something else would not be taxed; the tax is only upon his capital in the banking business."

This the court refused to do, and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayer for instructions, to instruct the jury as follows, namely:

"Merely loaning on stocks or merely receiving stocks for sale does not *per se* constitute one a banker; one must have a place of business where such loaning or receiving is generally carried on; a place of business for that purpose, not where such a transaction is an incident nor where it may become a legal inference as an incident to the general conduct of some other main business."

This the court refused to do, and plaintiff's counsel duly excepted.

Plaintiff's counsel also requested the court, in accordance with the following prayers for instructions, to instruct the jury as follows, namely:

"The loan on stocks or receipt of stocks for sale, instead of being

incidental to some other transaction and pursuit, must be a
75 main and general feature of the business to come within this language of the statute."

This the court refused to do, and plaintiff's counsel duly excepted.

Thereupon the court instructed the jury to render a verdict for the defendant, to which instruction plaintiff's counsel duly excepted; whereupon the jury did render a verdict for the defendant under said direction and exception.

And because none of the said exceptions so offered and made to the rulings, instructions, and decisions of the court do appear upon the records of the said trial, therefore, on the prayer of the said plaintiffs, by *their* counsel, said judge has hereby allowed the said several exceptions and has signed this bill of exceptions this 19th day of March, 1886, as and for the sixteenth day of December, 1885, the day of the trial and verdict as aforesaid.

HOYT H. WHEELER.

Endorsed: U. S. circuit court, south'n dist. N. Y. David Richmond, pl'ff & appe't, *vs.* Marshall B. Blake, d'f't — resp't. Bill of exceptions.

76 SIR: You will please take notice that the within is a copy of appellant's proposed bill of exceptions in the above-entitled action.

Dated New York, Feb'y 27th, 1886.

TREMAINE & TYLER,
Attorneys for Plaintiff and Appel't, No. 67 Broadway.

[Endorsed:] U. S. circuit court. Filed Mar. 22d, 1886. Timothy Griffith, clerk.

77 *Assignment of Errors.*

Supreme Court of the United States. October Term, in the Year of our Lord 1886.

DAVID RICHMOND, Plaintiff in Error,
ag't
MARSHALL B. BLAKE, Defendant in Error.

Afterwards, to wit, on the second Monday in said term, before the justices in the Supreme Court, at the Capitol in the city of Washington, comes the said David Richmond, by Tremain & Tyler, his attorneys, and says:

That in the record and proceedings aforesaid there is error in the several rulings of the court to which exception has been taken and in the refusal of the court to admit testimony and in the re-
78 fusal of the court to submit the testimony to the jury and in other respects where exception was taken and allowed, as more fully and at large appears by the bill of said exceptions as the same appear of record, and that by the record aforesaid it appears that judgment aforesaid in form aforesaid given was given for the said defendant against the said plaintiff, whereas by the law of the

land the said judgment ought to have been given for the said plaintiff in error against the said defendant in error, and the said plaintiff prays that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings, as the same appear
79 more fully therein, may be reversed, annulled, and altogether held for nothing, and that he, the plaintiff, may be restored to those things which he has lost by reason of said judgment.

TREMAINE & TYLER,
Attorneys for Plaintiff in Error.

Endorsed: U. S. Supreme Court. David Richmond, plaintiff in error, ag'st Marshall B. Blake, defendant in error. Assignment of error-. Tremain & Tyler, attorney- for pl'ff in error, 167 Broadway, New York city. U. S. circuit court. Filed Jul. 21, 1886. Timothy Griffith, clerk.

80 *Joinder in Error.*

Supreme Court of the United States. October Term, in the Year of our Lord 1886.

DAVID RICHMOND, Plaintiff in Error,
ag't
MARSHALL B. BLAKE, Defendant in Error.

And now comes the said Marshall B. Blake, by Stephen A. Walker, his attorney, and says that there is no error in the proceedings and record aforesaid in manner and form as assigned by the plaintiff in error, &c.

STEPHEN A. WALKER,
U. S. Attorney and Attorney for the Defendant.

81 "Endorsed:" U. S. Supreme Court. David Richmond, plaintiff in error, *vs.* Marshall B. Blake, defendant in error. Joinder in error. Stephen A. Walker, United States attorney, attorney for defendant. U. S. circuit court. Filed July 23d, 1886. Timothy Griffith, clerk.

82 United States Circuit Court, Southern District of New York.

DAVID RICHMOND, Plaintiff,
vs.
MARSHALL B. BLAKE, as Collector of Internal Revenue in and for the Second Collection District of New York, Defendant.

The plaintiff having paid $31.75, the costs in this action, and no money judgment being entered against him, it is hereby consented by the attorney for the defendant that this stipulation may take the place of the bond or security required before the issuing of the citation accompanying the writ of error in this cause.

Dated New York, March, 1886.

STEPHEN A. WALKER,
U. S. Att'y for Defendant.
TREMAINE & TYLER,
Att'ys for Pl'ff.

83 Endorsed: U. S. circuit court, southern dist. of N. Y. David Richmond *vs.* Marshall B. Blake, as collector of internal revenue, &c. Stipulation waiving bond and taking its place. Tremaine & Tyler, att'ys for plaintiff, 167 Broadway, New York city. U. S. circuit court. Filed Mar. 30th, 1886. Timothy Griffith, clerk.

84 UNITED STATES OF AMERICA, *ss:*

To Marshall B. Blake, as collector of internal revenue in and for the second collection district of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein David Richmond is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated March 30, 1886.

WM. J. WALLACE.

85 [Endorsed:] U. S. Supreme Court. David Richmond, plaintiff in error, against Marshall B. Blake, as collector of internal revenue in and for the second collection district of New York, defendant in error. Citation. Tremain & Tyler, att'ys for pl'ff in error, 167 Broadway, New York City.

Due service of a copy of the within citation is hereby admitted this 30 dav of March, 1886.

STEPHEN A. WALKER,
U. S. Att'y.

[Stamped:] U. S. circuit court. Mar. 30, 1886. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 752. David Richmond, plaintiff in error, *vs.* Marshall B. Blake, collector of internal revenue for the second collection district of New York. Filed October 13, 1886.

Supreme Court of the United States,

OCTOBER TERM, 1889, No. 171.

DAVID RICHMOND,
Plaintiff in Error,

AGAINST

MARSHALL B. BLAKE, Collector of Internal Revenue for the Second Collection District of New York.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Statement.

The plaintiff in error brought this suit below to recover an alleged illegal tax. The Commissioner of Internal Revenue had assessed, and the Collector of Internal Revenue in New York had collected, a tax at the rate of one twenty-fourth of one per cent. each month for four periods of six months each (ending December 30th, 1882), on the capital alleged to have been employed by plaintiff in error in the business of banking.

The plaintiff in error was a stock broker. He was not a banker, and, as he claimed, did not do a banking business, and did not have any of his "capital employed in the business of banking." Some officers of the Government, however, claimed otherwise. In justice to

the defendant, his own testimony should be noted (Rec., fol. 29) that *he* "did *not* make that assessment; it was made by the Commissioner of Internal Revenue." The opinion of the superior officer, of course, prevailed, and resulted in the defendant's exactions of the questionable taxes pursuant to the Commissioner's assessment. Accordingly, the plaintiff in error, in due season, and after the proper preliminary steps (Rec., p. 26), sued to recover back the sums thus paid with interest as taxes "erroneously or illegally assessed or collected" (see the provisions of Section 3226, U. S. R. S.; also Section 3220). The defense below was made by the Government, and the tax was claimed to be legal under the second subdivision of Section 3408, U. S. R. S.

The plaintiff in error claims that, as well under the statutes as according to the actual facts, the "business of *banking*" is *not* the "business" of the *stock broker;* and that the *capital used by* plaintiff in error as a *stock broker* is *not* in any sense "capital *employed in the business of banking.*" This distinction plaintiff claimed was fully established by the evidence received; while it is further claimed that testimony by way of fortifying this distinction was erroneously excluded by the Court below at the trial (Rec., p. 65). It was further claimed that the Court errorneously refused to submit the case to the jury (Rec., fols. 66 to 75).

The Controversy

represented by the trial below has an official history, the significance of which is, that, in recognition of the statutory, departmental and actual *distinctions* between *stock brokers* and the *business of banking*, the plaintiff, together with some other members of the N. Y. Stock Exchange similarly engaged, had not theretofore been regularly taxed upon their alleged capital that was employed in the business of stock brokerage, as if such em-

ployment were the equivalent of capital employed in the business of banking; but had been taxed in other ways. For instance, brokers had been taxed upon their sales and for license fee, and, if bankers, also therefor a different license fee, and otherwise as from time to time enacted by statutes mentioned later in this brief.

Questions had arisen in respect to the amount of capital stock subject to tax of parties who concededly carried on a banking business; but who by the official assessments were taxed upon an amount which it was claimed was largely in excess of their *capital* employed in such business. In many cases the actual capital of private bankers was a matter of difficult estimation; and this embarrassment was intensified where the parties taxed were concededly engaged not only in the business of banking, but in the stockbrokerage business. There were also some private bankers who did no stockbrokerage business whatsoever, and whose only difference with the taxing officials was the proper amount to be deducted in cases where their gross investments (resulting from deposits and all sources) were in United States bonds, and consequently untaxable. There were also many merchants who necessarily conducted business with more or less banking features or incidents in connection with their general transactions, none of whom were taxed as bankers. Questions had also arisen where the same firm carried on a stockbrokerage and a banking business combined, as to what disposition should be made of borrowed money or borrowed capital;—it being the fact that a large amount of money used in such business by particular firms was borrowed money, and was claimed to be capital. This borrowed capital was ultimately held by the Courts not to be taxable. With the decision of the case of Clark vs. Bailey, 21 Wallace, in this Court, and the Legislation of 1872 (17 U. S. Stat., 625), it was supposed that all the substantial controversies in this behalf were

terminated. It seems, however, that the Washington Internal Revenue bureau in the year 1881, so far revived further controversy as to subject certain well-known members of the New York Stock Exchange supposed to have *any* capital (and some had no capital or needed none), to further official visitation; and upon the new device that some brokers were subject to the tax on banking capital there was obtained sufficient information to enable some such a tax to be declared; so that upon an estimated capital in each case, a tax was assessed against these brokers, as though *their* capital was "employed" in the "business of banking," and subject to the tax of one twenty-fourth of one per cent. each month, under the second subdivision of Section 3408, U. S. R. S.

In the case at bar the plaintiff in error insisted that he had no capital whatever employod in the *business of banking;* that he did *not* carry on the *business of banking;* that his "business was that of a stock broker," which "is a well defined avocation," and "consisted in buying and selling stocks for customers and carrying them by borrowing money for customers to carry those stocks on" (Rec., fol. 31). That in contradistinction to being a banker or a person 'having a place of business where credits are open by the deposit or collection of money or currency subject to be paid or remitted upon draft, check or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale," or to being a person whose capital was directly or indirectly "employed" * * * "in the business of banking;" that the plaintiff was a *stock broker* who was during the period in question always a borrower and not a lender of money. "I borrowed much more money than I loaned during that period all

the time," says the plaintiff. "As a matter of fact, during the period from 1880 to 1882 (the entire period covered by the tax in controversy) our house were always borrowers (Rec., fol. 59).

The plaintiff's testimony went on to describle his method, which was the general method of transacting business between *stock brokers* who were members of the New York Stock Exchange; and to detail circumstances which, as plaintiff claimed upon the trial, should have been submitted to the jury to determine whether it was the fact or not that the plaintiff *did* have any "capital employed in the business of banking beyond the average amount invested in United States bonds, and, if so, how much?" The plaintiff did not keep a "place of business" where persons deposited funds subject to check, draft or order; nor did he keep a "place of business" where money was advanced or loaned on stocks or bonds, or where stocks or bonds were received for discount or for sale. Transactions of this character whenever they occurred, which was rare, were the subordinate incidents to the transaction of plaintiff's general *business* of a *stock broker*; as much so as the drafts, remittances, debits and credits for or against merchandise, are the counting-room incidents of the "business" a merchant. The plaintiff's place of business was for the purpose of carrying on his business arising from his membership and activity in the New York Stock Exchange; and what the plaintiff did in an apparent departure from was in truth exclusively *incidental to that business*, and solely for the purpose of carrying on that stock brokerage business. The very money with which the stocks for his customers were bought and paid for was borrowed money. What the plaintiff did not borrow from strangers he secured for himself by margins from his customers; so that in all cases all of his stocks and securities were bought and paid for with borrowed funds. In such a business, if the broker has good credit and an active clientage, of

course no capital whatever need be required; but in the plaintiff's case, as he testified, he was accustomed to have from $30,000 to $50,000 of his own which he found it convenient to keep to his credit in the bank where he kept deposits, so that he might not be inconvenienced in paying for his stocks before the business hours for the day should be ended, and before he should be able to make such deposits to his credit in the banks as would enable him to close his daily transactions; or if necessary to carry his transactions over night when they should be necessary, as the plaintiff explained was frequently necessary, because of the Stock Exchange custom of not delivering stocks before a specified time on the day after their purchase or sale, unless otherwise specified in the transactions.

The Questions.

The *plaintiff contended* (1) that if under the proofs in this case the legality of the tax was to be determined exclusively as a question of law, that there was *no ground upon which the tax in question could lawfully have been assessed;* and (2) that, if the invalidity of this tax was not to be adjudged exclusively as a conclusion of law, *its propriety* should at least have been *subjected to the finding of the jury* upon the issue as to whether, under all the circumstances of the case, and in view of testimony as delivered, there was *in fact* any of the plaintiff's capital "employed in the business of banking, beyond the average amount invested in United States bonds."

These questions were presented at the trial in a variety of ways, and the exceptions were taken, as it will appear from the record, in many forms. The restrictions of the Court, in its exclusion of some of the proffered testimony and the lines within which the evidence was limited, as well as the refusal of the Court to submit some of the specific questions suggested

for the jury, indicate that the Court below refused to distinguish or to permit the jury to distinguish between the business of a stock broker and the capital *he* employs, and the business of a banker and the capital "employed" by *him* in the "business of banking." This distinction is presented by the record brought here on this writ of error as an actual distinction as well as a legal, departmental, statutory and usual distinction; and in form arises upon the following

Specifications of Error.

I. It was error for the Court "to instruct the jury to find a verdict for the defendant," to which ruling the plaintiff excepted; and to refuse "to submit the evidence to the jury," to which ruling the plaintiff excepted (Rec., fol. 66, and exception repeated at fol. 75).

II. It was error for the Court to refuse to submit to the jury the question, "Did the plaintiff have a place of business where credits were opened by the deposit or collection of money subject to be paid or remitted upon draft, check or order, and was the capital on which he was taxed employed in such a business," to which refusal plaintiff excepted; and likewise refused to submit the question, "Did the plaintiff have a place of business where money was advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, and was the capital on which he was taxed employed in such a business?" to which refusal plaintiff excepted; and it was error likewise to refuse to submit to the jury the question, "Did the plaintiff have a place of business where stocks, bonds, bullion, bills of exchange, or promissory notes, were received for discount or for sale, and was the capital on which he was taxed employed in such a business," to which refusal plaintiff likewise excepted (Rec., fol. 67).

III. It was error for the Court to refuse to submit to the jury the question whether "in the general business of the plaintiff which he calls that of stock broker, the capital on which he was taxed was employed in the business of banking," to which refusal plaintiff excepted (Rec., fol. 68).

IV. It was error for the Court to refuse to instruct the jury as follows: "In answering the foregoing questions, the jury will have regard for the general business of the plaintiff and its general character and methods, and not exclusively to its incidents and exceptional occurrences," to which refusal plaintiff excepted. And it was likewise error to refuse to give the following instruction: "That which is taxed is the capital employed in the business as it is generally carried on, and not as respects its exceptional features, and if the jury are satisfied that the plaintiff's business in its general characteristics is not aptly described in the foregoing questions, they will render a verdict in plaintiff's favor;" to which refusal plaintiff excepted; and the Court erred likewise in refusing to give the following instruction: "To be taxable, plaintiff's capital must have been employed in a general business and in a place of business in one or more of the ways indicated in the first three questions (see first assignment of error), and not in a business to which one of those ways or a part of it is incidental;" to which refusal plaintiff excepted (Rec., fol. 69).

V. It was error for the Court to refuse to instruct the jury as follows: "The jury are at liberty to regard the circumstance that Congress has by legislation recognized the distinction between bankers, as such, and brokers, as such, and bankers doing business as brokers;" to which refusal plaintiff excepted. And it was likewise error to refuse to give the following instruction: "If the business of stock brokerage is a dis-

tinct and well-defined avocation not fairly described by the foregoing questions or all or any of them, and the plaintiff's business as a stock broker, according to the descriptions in testimony, be of that distinctive character, then the capital employed in such a separate occupation is not subject to the tax imposed, and plaintiff is entitled to recover;" to which refusal plaintiff excepted (see Rec., fols. 69 and 70).

VI. It was error for the Court to refuse to instruct the jury as follows: "The jury are to determine whether the plaintiff had any capital employed in the business of banking, as that term is usually understood in trade and commerce;" to which refusal plaintiff excepted (Rec., p. 28).

VII. It was error for the Court to refuse to instruct the jury as follows: "The jury are to determine whether plaintiff's business in which he engaged his capital was or was not the loaning or advancing money on stocks, bonds, bullion, bills of exchange, or promissory notes; and, in answering this question, will consider whether transactions of this character were exceptional and incidental or were substantial features of plaintiff's business to which he devoted more or less of his capital;" to which refusal plaintiff excepted (Rec., fol. 71).

VIII. It was error for the Court to instruct the jury as follows: "The Government was not entitled to a tax on any sums as capital which were not in truth and fact set apart and designed by the plaintiff, and by him actually employed in the business of banking as above described;" to which refusal plaintiff excepted (Rec., fol. 71).

IX. It was error for the Court to refuse to instruct the jury as follows: "The phrase 'capital actually

employed in the business of banking' must be given its fair and ordinary signification, and, therefore, the jury must give it such application to the case at bar as is consistent with its ordinary use, as, for instance, as applied to banking corporations;" to which refusal plaintiff excepted; and it was likewise error to refuse to instruct that "the jury must determine what was the plaintiff's capital and what part thereof, if any, was fairly employed in banking business;" to which refusal plaintiff likewise excepted (Rec., fol. 72).

X. It was error for the Court to refuse to instruct the jury as follows: "In taxing capital employed in the business of banking the law does not discriminate between corporations and associations and individual bankers or firms. It is the intention and organization of the business and its actual conduct and the capital that is engaged in it that is to control the tax. 'There is no difference in the business of banking as conducted by individuals from the business as conducted by corporations which would warrant any different meaning being given to the term *capital* in the two cases;'" and to this refusal plaintiff excepted, (see Rec., fol. 73, and the cited case in this Court where such language is used).

XI. It was error for the Court to refuse to instruct the jury as follows: "Parties may do business as bankers and may also engage in other transactions without enlarging their liability to be taxed as bankers;" and to such refusal plaintiff excepted; and it was likewise error for the Court to refuse to instruct that, "In such cases it is only the amount established to the jury's satisfaction to be the capital employed in the separate banking business that forms the subject matter for taxation;" and the plaintiff excepted; and it was likewise error to refuse to instruct that "A party may do business as banking and something else, and his

capital employed in this something else would not be taxed; the tax is only upon his capital in the banking business;" to which refusal plaintiff likewise excepted (Rec., fol. 74).

XII. It was likewise error for the Court to refuse to instruct the jury as follows: "Merely loaning on stocks or merely receiving stocks for sale does not *per se* constitute one a banker. One must have a place of business where such loaning or receiving is generally carried on; a place of business for that purpose, not where such a transaction is an incident, nor where it may become a legal inference as an incident to the general conduct of some other main business." To which refusal plaintiff excepted. And it was likewise error for the Court to refuse to instruct that "the loan on stocks or receipt of stocks for sale, instead of being incidental to some other transaction and pursuit, must be a main and general feature of the business, to come within this language of the statute." To which refusal plaintiff excepted (Rec., fols. 74 and 75).

XIII. It was error for the Court to refuse to receive evidence tendered in plaintiff's behalf as to the "usages in the conduct of the stock business in the City of New York," and "to show what was in fact the general avocation of stock brokers" during the legislative enactments applicable to taxation or business of this general character. To which refusal plaintiff excepted (Rec., p. 25).

XIV. It was likewise error for the Court to refuse to receive evidence of the official usage of the Internal Revenue Department "respecting the classification of persons doing business as stock brokers, and the classification of persons doing business as bankers, or who had capital employed in the business of banking;" to which refusal plaintiff excepted and claimed the right

to present "the usage in the business" as a proper element to be considered in connection with the legislation of 1874 (Rec., fol. 65).

XV. The similar exclusion of useful items of explanatory testimony under the topic mentioned in the preceding assignment, as elsewhere excepted to, is likewise assigned for error. Thus: Q. (By plaintiff's Counsel) "Is it a part of your business to advance any money to the customer? * * * Q. (By Plaintiff's Counsel) Is it or not the fact that many members of the Stock Exchange have no office whatever of their own? Objected to. Plaintiff's Counsel: It is part of the definition of the broker; we are to explore what is a broker. The Court: He has nothing to do with what is a broker. Plaintiff's Counsel: The old statutes speak of brokers, and the question is whether a broker is or is not a separate avocation. The Court: The old statutes have been repealed, and if this man is taxable as a broker it is all right whether he was a broker or not. If he was not actually a banker, why of course he has been wronged. Objection sustained, and plaintiff's counsel duly excepted" (see Rec., p. 24). Here, as it is claimed, the Court erred. Besides, it was not the man, the individual, the banker who was taxable; but it was *the thing, i. e.*, the *capital* employed in the *business* of *banking*.

XVI. Error is likewise assigned for permitting defendant's counsel to introduce testimony, as appears in in the following extract from the record, immediately following witness' statement that he kept a ledger containing accounts with his customers: Q. (By Defendant's Counsel): "What does that account show? * * * Plaintiff's Counsel: (Objecting as immaterial,) the way a stock broker or any other party keeps his books of account, as long as there is no statute regulating the method of

keeping the books, as there is concerning tobacco and distillers of liquor, for the purpose of ascertaining the taxes imposed,—the way that anybody keeps books of account is utterly inconsequential and is utterly immaterial. The Court: He may let us know if it is his custom to keep an account with his customer. Plaintiff's Counsel: I take the benefit of an exception. The Court: He may answer the question as to whether he opens an account with his customer. A. I do. Q. Do you credit him with the margin which you receive? (Plaintiff's counsel objecting.) The Court: You can answer. Plaintiff's Counsel: I take the benefit of an exception as irrelevant and incompetent. A. We credit him with the amount; if it is money he receives credit for it; if it is securities he receives credit, of course, for that. Q. Do you charge him with the cost price of the stock purchased pursuant to his order? Plaintiff's Counsel: I object to that as immaterial, irrelevant and incompetent. The Court: He may answer. A. I do. Q. And do you charge him with the interest on the difference between the cost price of the stocks and the amount of his margin? A. I do. Q. How is your difference settled? Plaintiff's Counsel: We object to that as already answered, and as irrelevant, incompetent and immaterial. The Court: He may answer. Plaintiff's Counsel: We take the benefit of an exception" (Rec., p. 16).

Under these objections considerable evidence was received as per the ensuing pages of the record, and among the other subordinate questions was the following: "Q. At what rate of interest were your customers charged for these debits against them during the years 1880, 1881 and 1882?" which being objected to as immaterial, irrelevant and incompetent, and the objection overruled under appropriate exception, further evidence of the same character was received (see Rec., pp. 17, 18, 19 and 20).

Further subordinate questions, the answers to which

were received under like exception, are found at folios 49 and 50 thus: "Q. Is he credited with that amount of margin? (Plaintiff's counsel objecting). THE COURT: We will take his course of procedure. Plaintiff's counsel then excepted. * * * Q. On your books is he debited with anything?" Plaintiff's counsel objected; objection overruled and exception."

Even if this testimony be unobjectionable as secondary evidence of the contents of the books, it would seem that the Court ruled inconsistently and erroneously either in refusing to permit the plaintiff to pursue evidence as to usages of trade, etc., or as to permitting the defendant to pursue such usages, or even specific usages. The refusals of the plaintiff's offers, it is claimed here, worked prejudice against the plaintiff, while the reception of the defendant's proofs likewise operated seriously against the plaintiff. And it is claimed, if not both, certainly one or the other of this class of rulings is error.

XVII. It was error for the Court to refuse to receive evidence offered on the plaintiff's examination-in-chief in response to the following questions: "Q. Do you know whether or not the business of banking is a well defined avocation? Defendant's counsel objected and the Court sustained the objection, and the plaintiff's counsel duly excepted."

XVIII. It was error to exclude evidence in response to the following questions asked upon the direct examination of plaintiff by his counsel:

"Q. Does the business of stock-brokerage as you have described it necessarily require capital? * * * The Court: You can ask him if he has money employed in the business. Q. Did you have any capital employed in the business of stock broker? A. I did. Q. Did you have any capital employed in the business of banking? * * * (Objected to as leading and

calling for the witness' conclusion.) The Court: We will admit what he did. *He need not answer.* Plaintiff's counsel excepted. Q. Did you have any capital employed in any other business except stock brokerage? * * * (Same objection. Objection sustained.) Plaintiff's counsel excepted. Q. Were you engaged in any other business except that of stock broker at that time? A. None whatever. Defendant's Counsel: * * * I move to strike out the question and answer * * * on the ground that it is calling for the witness' conclusion. * * * The Court: What his conclusion is or what he says it is would be of no account whatever to the jury. We want the fact—what he did,—not what he thinks he did. Plaintiff's counsel: I want to negative any possibility that he was in two or three businesses at the same time and to show that negative by appropriate testimony. The Court: You may understand that the question is excluded. Plaintiff's counsel excepted" (Rec. pp. 10, 11).

XIX. It was likewise error for the Court to refuse to receive evidence that there existed a *class of houses in the mercantile community known as banking houses;* and to refuse the proffered evidence that the business of banking "was an avocation that was well defined as a business by itself, which was accepted in the commercial world as 'the business of banking';" as by such evidence the courts might "apply a tax on the capital that was actually employed in such business * * *" (see the offer in full at folios 55, 56 and 57, ending with the ruling by the Court excluding all that class of testimony under the proffers submitted by counsel for the plaintiff). The Court decided: "I don't think your view is one I should desire to adopt; still, I desire that you have every opportunity to raise any fair question on the statutes. Perhaps you will raise it as well if it is excluded as if it is received, and I therefore exclude the testimony which will save you the question;" to

which ruling plaintiff's counsel excepted (see fols. 55, 56, 57 and 58).

The statutes claimed by the Government

to justify the tax in question are as follows:

U. S. R. S., Section 3408. There shall be levied, collected, and paid as hereinafter provided * * * "a tax of one-twenty-fourth of one per centum each month upon the capital of any bank, association, company, corporation, and *on the capital employed by any person in the business of banking* beyond the average amount invested in United States bonds. Provided that the words, 'capital employed,' shall not include money borrowed or received from day to day in the usual course of business from any person not a partner of, or interested in, the said bank, association, or firm.

Section 3407. "Every incorporated or other bank, and every person, firm or company having a *place of business where* credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or *where money* is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes, or *where* stocks, bonds, bullion, bills of exchange or promissiory notes are received for discount or for sale, shall be regarded as a bank or as a banker."

The purposes respectively fulfilled by each of these sections in the successive schemes of internal revenue taxation, antecedent to the Revised Statutes, appear elsewhere in this brief; and such history furnishes valuable factors in considering the enactments which were in force at the time the Revised Statutes were enacted, and consequently in applying and construing the revision itself.

POINTS OF ARGUMENT.

I.

The property upon which the tax in this case was levied and collected was not in any fair sense "capital employed by plaintiff in error in the business of banking," and was not, therefore, subject to tax under Section 3408, U. S. R. S.

Plaintiff was a stock broker, an avocation that for many hundreds of years has been recognized both in England and in this country as entirely distinct from that of the banker. In *Dos Passos on Stockbrokers, Ch. 1*, the origin of the word "broker," and the history of the broker's occupation is set forth, and it is shown that the term "broker" occurs in Acts of Parliament as early as the year 1285. Brokers from time immemorial are shown to have been "intermediaries in the purchase and sale of property." Brokers' Exchanges have been recognized by English and American usages and lawmaker sand law writers for more than a century. In New York, as early as 1792, an organization of "brokers for the purchase and sale of public stock," is recorded (Dos Passos on Stockbrokers, Ed. 1882, pp. 1 to 10).

The business of stock broker is and always has been distinct from the business of a banker. "Stock brokers are persons who confine their transactions to the buying and selling of property in the public funds and other securities for money." Bouvier's Law Dictionary says: Stock brokers are "those employed to buy and sell shares of stocks in incorporated companies and the indebtedness of government."

Generally speaking, a banker is defined as "one who traffics in money, receives and remits money, negotiates bills of exchange, etc." The leading feature in the

avocation of a banker is *money*, cash to be paid by him because of credits with him, or to be paid to him because his customers wish credits with him upon which they may draw and receive money. The statutory description of a banker accords with the common and commercial understanding in these respects, as denoting a trafficker in money; and incidentally handling securities that aid in trafficking *in money*. The business of the stockbroker was *to traffic in certain established securities* in the method prescribed by recognized commercial associations, and for the gain resulting from such a traffic. Of course, in this, as in the traffic with any other commodity, money is required, and receipts, payments, debits and credits are given; but these, as well as the use of money, are only incidents to the business of the broker, as they are similar incidents to the business of the factor or merchant and many other persons. *The banker is primarily a dealer in money; the broker is primarily a dealer in securities.* The banker acts for himself; the broker is employed by others. The business of the plaintiff in this case was indubitably that of buying and selling upon commission and for others property in the public funds, and other securities for money; and the property upon which the tax was levied and collected in this case, was his personal bank deposits employed by him in that business, to wit, his business of a stockbroker. As well might a merchant's, factor's or lawyer's bank balance be taxed as capital employed in the business of banking, because sometimes made the source of loans upon securities.

The fact that plaintiff while engaged in his business as stockbroker, made certain entries in his books which bore a similitude, in that they were credits, to what bankers might do, even if those credits could properly be deemed the equivalent of loaning money to the customer upon the securities of the customer bought upon his order, does not convert the *stockbroker's* capital into

a capital *emyloyed by the stockbroker in the business of banking.* Such similarity or equivalents exhibit only *incidents of his business of a stockbroker.* Any merchant or factor may incidentally traffic in money in carrying on his business, by making loans or advances or credits to his customers upon securities, or notes, or upon the merchandise that he sells to them ; yet that fact does not constitute the portion of the merchants or factor's capital so employed by him in the incidents to his business of a merchant or factor, *capital employed by him in the business of banking,* and, therefore, subject to tax under the second paragraph of Section 3408 U. S. R. S.

The question is simply: *What was the business of this plaintiff in which his capital as taxed was employed?* That business, it is submitted, was the business of a *stock broker ;* and as such was a well defined business which has been recognized and described in a long line of adjudications as not only entirely a legitimate business, but one marked by many peculiarities that distinguish it from the business of banking.

II.

The business of banking is distinguished from the business of a stock broker by many peculiarities.

Mr. Justice WOODRUFF in the case of Markham vs. Jaudon, 41 N. Y., 256, calls attention to the following peculiarities: "The stock broker pays the price, receives the property, often takes title in his own name." "The transaction is an executory agreement for a pure speculation in the rise and fall of stock, which the

broker, on condition of perfect indemnity against loss, agrees to carry through in his own name, and on his own means." "The transaction does not contemplate that the customer will ever receive the stock or own it." As Mr. Dos Passos expresses it, at page 108 of his book on stock brokers: "During the time the stock or securities remain in the possession of the broker, he uses them to raise money with which to carry on his business, and no attempt is made to keep the stocks separate or to keep the identical certificates on hand, the client usually being satisfied if the broker is able to deliver the number of shares purchased without any regard to particular certificates." None of these peculiarities attach to transactions ordinarily made in the *business of banking*, or to a business carried on as such, " where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale " (U. S. R. S., 3407; see also Rec., fols. 39 to 41).

A banker when he loans money on stocks, bonds, bills of exchange or promissory notes, or receives them for discount or for sale, does not own or hold in his own right the securities thus received or pledged. It is otherwise with the broker. In a case involving damages upon a broker's transaction, the New York Court of Appeals happened again to have described some of the leading features of the business of brokers which distinguishes their transactions from transactions as usually conducted in the business of banking. In Baker vs. Drake, 53 N. Y., 216, RAPALLO, J., says:

"The plaintiff (the customer) did not hold the stocks as an investment, but the object of the transaction was to have the chance of realizing a profit by their sale. He had not paid for them. The defendants (brokers) had supplied all the capital embarked in the speculation except the comparative trifling sum which remained in their hands as margin. Assuming that the sale was in violation of the rights of the plaintiff, what

was the extent of the injury inflicted upon him? He was deprived of the chance of a subsequent rise in price. But this was accompanied with the corresponding chance of a decline; or, in case of a rise, of his not availing himself of it at the proper moment; a continuance of the speculation also required him to supply further margin, and involved a risk of ultimate loss. If, upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale; would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period? *If the stocks had been paid for and owned* by the plaintiff, different considerations would arise, etc., etc. * * *"

These peculiarities of a stock broker's business indicate that such a *business* is readily distinguished, in fact as well as in law, from the *business of banking*. The stockbroker buys and sells stocks for his customers, and handles the stocks purchased in such a way as to make the capital employed by him in his business—that is to say, in the business of buying and selling—as available as possible. The other deals in money and handles property that comes into his hands as an ordinary pledgee or vendee, and exclusively by way of security or purchase. *The business of the one* is to buy and sell stock on commission, and he acts as the interest of that business may require. *The business of the other* is to traffic in money, and he acts as the interests of that business may require.

III.

The Business of Plaintiff in Error.

By the record in the case at bar it was proved below that the business of the plaintiff in error, as described, was in harmony with these well-known distinctions. Thus, Mr. Richmond says that the business of a stock broker is "a well-defined avocation"; and that his business "consisted in buying and selling stocks for customers, and carrying them by borrowing money for customers to carry these stocks on." This was a business carried on by a great many members of the New York Stock Exchange, among whom are some bankers; but the business carried on there as a rule is that of stock brokers" (Rec., fol. 31). He was asked: "Q. Did you have any capital employed in the business of stock broker? A. I did. * * * Q. Were you engaged in any other business except that of stock broker at that time? A. None whatever" (Rec., fol. 32). * * * "If a customer came into my office to buy stock, he would give me an order and hand me a margin to protect me against loss for the purchase; then, the next day, when the stock was delivered to me, I would borrow money to pay for it. This is a regular purchase; sometimes customers pay in full for the stock. We seldom book orders; we buy stock on the Stock Board, sometimes receiving a margin and sometimes not. We receive certificates purchased on the Stock Board, as a rule, next day. It is sent to my office by the seller, and he recives a check in payment drawn on the Leather Manufacturers' Bank against a deposit I keep there, and that deposit is, as a rule, my own money (Rec., fol. 36). Q. Your capital? A. A portion of it, not always. * * * It was on that capital that I made the return for taxation; * * * it was on that return that I was taxed one-twenty-fourth of one per cent.

per month, and it is to recover back that tax that this suit is brought. * * * As a rule, *my capital is not all in use*, some of it was in the bank, * * * Q. As a matter of fact, did you get discounts at the bank during this period of time? A. I have had money borrowed at the bank during that time on stocks, * * * no discount, but on loans from the bank; I never had a note discounted in my life. * * * As a rule, when the stock purchased was delivered to my cashier, we would draw the check. If my bank balance was lower than it should be, I would borrow money sometimes but not always, by hypothecation of the stock purchased, in order to make up a proper amount again. I might use that stock, or I might use other stock to borrow the money to keep the bank balance up, but I would not go to work and use that stock before I paid for it. The check is paid the next day, as it has to come through the Clearing House first. After the stock was received, sometimes we would borrow money on it in the course of half an hour, sometimes it would lie in the drawer for a week, and then borrow money on it. * * * Sometimes that stock might be sold by the customer and would not go into the drawer. The sale might be simultaneous. He might tell me if it went up one point to sell it right out again. * * * If we bought stock for a customer which was not held in very high repute by the banks, we might use it to borrow money on or we might not. * * * We have no fixed time when a customer pays for the balance over and above the margin on the price of the stock; sometimes he does pay and sometimes he does not. Sometimes he sells it again. As a rule, if the stock is delivered to him, he pays for it then, sometimes sooner; sometimes it is delivered to him, sometimes not. Sometimes he pays for it at once, and sometimes not. At the time of the purchase he sometimes pays a percentage, and sometimes merely hands me over stocks and bonds as margin. "Margin" is

money put up to secure me against loss for stock which I buy for my customers at a certain price, if I should sustain loss. * * * A margin may be either cash or its equivalent in some security" (Rec., fols. 39, 40, 41). * * *

Referring to the possible but rare instances of a customer coming in with a certificate to sell, the same witness says, as to the proceeds: "If the seller wants the the money I give it to him [meaning after the sale. See context]. If he does not want it, he may leave the money there over night or two or three days, but that that would be only incidental to the business. It is not my line of business to receive money in that way; *it is an incident of the business.* When it is left with me the customer in the country does not make a draft on me; I almost invariably send him my own check. A customer never drew on me for that sum, never. Q. Speaking of a customer who comes into your office and receives an amount there in that way, say for a day or two or a week, does he draw his check on you for that amount? A. No, never for that kind of a favor, never; never had an instance of that kind in my life. The Court: You do not hold any funds to check? The Witness: Never as a rule. We very rarely have checks drawn against us by our customers. If we ever did, it was not in the manner of the general business at all, it was an exceptional thing (Rec., fols. 46 and 47). * * * Q. Do a great many brokers do business for banking houses? A. I have done business for houses in other lines of pursuit than my own. It is a common thing in my lines of business as conducted in this city, but I do not do so much of it as I do for individuals. Drexel, Morgan & Company and other similar firms employ persons in my line of business for the purchase and sale of stocks to a large extent." * * * "I do not always have all the money in the bank that is represented by all the checks that are drawn. Far from it. To make our account good before three o'clock we

have checks coming in and we keep putting them in. It is the course of business to make deposits so that our bank account shall be good before three o'clock. If we find we are short of money we usually borrow. *As a matter of fact, during the period from 1880 to 1882, our house were always borrowers. I borrowed much more money than I loaned during that* period of time" * * * "Stocks are very rarely delivered at the Stock Exchange; they are generally delivered at the office of the purchaser or the seller. Q. This transaction which takes place at the Stock Exchange is nothing more than an agreement between yourself and some one else? A. That is it" (Rec., fols. 59, 61) * * * "Q. Is it a part of your business to advance any money to the customer? * * * The Court: You may ask him whether he has any business other than that he has described. Defendant's Counsel: Carried on at this place or any other place. Plaintiff's Counsel: That is what I would like to have done, but I understood your Honor to exclude that. Q. Did you carry on any other business at the place you have described except the business you have already described? A. That is the way I said it."

IV.

These actual distinctions about "business" approved by this Court.

The foregoing distinctions, as described in the testimony and as existing according to general usage and the ordinary understanding of the terms, are all in harmony, not only with the statute itself, or any reasonable interpretation of it, but with the adjudications that have occurred in this and other Courts.

In *Warren vs. Shook, 91 U. S., 710*, this Court (by Justice HUNT), says upon this general subject:

"By the same section, Subdivision 9 (referring to Section 79, Act of March 3d, 1865, 13 Stat., 252, 472), a broker is defined to be one whose business it is to negotiate purchases or sales of stock, exchange, buillon, coined money, bank notes, promissory notes or other securities, for himself or for others. Ordinarily the term 'Broker' is applied to one acting for others; but the part of the definition which speaks of purchases and sales for himself is equally important as that which speaks of sales and purchases for others. *All parts of the definition are qualified by the words, 'whose business it is.' Thus, if A B has $10,000 which he desires to invest, and purchases United States stock, or State stock, or any other securities, he does not thereby become a broker. Nor if he owns $10,000 of United States stock which he wishes to sell to raise money to pay his debts, or because he is not satisfied with six per cent. interest, is he thereby made a broker. It is only when making sales and purchases* IS HIS BUSINESS, HIS TRADE, HIS PROFESSION, HIS MEANS OF GETTING HIS LIVING, OR OF MAKING HIS FORTUNE, *that he becomes a broker within the meaning of the statute. Nor is it believed that a sale by one doing a banking business only, of a security received by him for the repayment of a legitimate loan, would make him a broker, and subject to the tax. This would not be deemed an act of brokerage, either under the statute or upon general principles of law. When it is* HIS BUSINESS, *the statute properly holds all such acts, whether in the name of himself ostensibly or in the name of others, as the acts of a broker.* The danger and the facility for evasion of the statute furnish excellent reasons for the adoption of this provision."

A stock broker does not have a "place of business" where money is advanced or loaned on stocks, bonds, buillion, bills of exchange, notes, etc., or where they are received for discount or for sale. The plaintiff in error had no such place of business; and it was error not to permit the jury to weigh the testimony and to adjudge this fact.

The mere loaning of money on collateral does not constitute one a banker; one must have a *place of busi-*

ness where such *loaning as a business* is carried on ; not as an incident to the sale of commodities or stocks, or to some other business, but as the actual and general feature of the business itself. It is upon this *fact* that the tax depends; and it was error not to determine this fact in plaintiff's favor, or at least to permit the jury to determine this fact.

V.

The Revised Statutes historically considered.

(a) The definition contained in Section 3407, U. S. R. S., as to who shall be regarded as a banker was not originally enacted in the statutes for the purpose of determining what was meant by the term "business of banking" as a subject for taxation ; but such definition originated and was exclusively enacted for the purpose of denoting who should be "regarded as a banker" under concurrent statutes, and with reference to the provisions of law taxing different occupations by way of a special tax or license fee.

There is a useful significance in recurring to the legislation from which the language of this section is taken. Indeed, the taxes as described in Section U. S. R. S. 3408 are made clear by the legislation of which they are the remnants.

With relation to Section 3407, note the general scheme or outline of the fundamental Act of June 30th, 1864, 13 U. S. Stat. at Large, p. 251. It is as follows :

(1) The first 57 sections relate to and contain general provisions with reference to the administration

of this law, and they come under the title, "*General Provisions.*"

(2) The next eighteen sections (numbered from 53 to 70, inclusive) relate to and contain the provisions with reference to taxing spirits, ale, beer and porter, and they are under the title, "*Ale, Beer and Porter.*"

(3) The next eleven sections (numbered from 71 to 81, inclusive) relate to and contain the provisions with reference to taxing licenses, and they are under the title, "*Licenses.*"

Section 79 contains forty-nine subdivisions devoted to declaring what license fee shall be paid by persons engaged in the several callings or occupations therein referred to, and in each instance the subdivision, after specifying the calling and fee, defines who is to be "*regarded*" as within that calling or class.

Subdivision 1 of this section is now Section 3407 of the Revised Statutes, and Subdivision 9 of the same section taxes the occupation of the broker, and defined who should be "*regarded*" as a "broker."

(4) The next sixteen sections (numbered from 82 to 97, inclusive), relate to and contain the provisions for taxing manufacturers, and they are under the title, "*Manufactures, Articles and Products.*"

(5) Section 98 relates to, and is under the title, "*Auction Sales.*"

(6) Sections 99 and 100 are under the title, "*Brokers,*" and provision was there made for taxing brokers' sales one-twentieth of one per centum on the par value thereof.

(7) Sections 101 and 102 are under this title, "*Slaughtered Cattle, Swine and Sheep.*"

Section 103 is under the title, "*Railroads, Steamboats, Ferryboats and Bridges.*"

Section 104 is under "*Express Companies.*"

Section 105, "*Insurance Companies.*"

Section 106, "*Passports.*"

Section 107, "*Telegraph Companies.*"

Sections 108 and 109, "*Theatres, Operas, Circuses and Museums.*"

(8) Section 110 contains all that is now Section 3408, U. S. Revised Statutes, and is under the title, "*Banks and Banking,*" &c., &c.

It thus appears that Section 3407 was originally enacted as a part of the law providing for the collection of a license fee or specific tax from persons engaged in certain callings or occupations, and was under the head of "Licenses," and each subdivision of this section (79) named the occupation to be taxed, the amount of the tax or license fee, and then defined who were to be included in that calling. The inference is that it was designed solely to define who was a banker for the purpose of fixing the tax or license fee there provided, upon all engaged in that calling; and *for that purpose* it therefore defined the "Banker;" but it did not, nor was it intended to define generally the "business of banking" or the capital *employed in such business*, or in any way to determine the taxes otherwise provided for in Section 110.

(*b*) The following further facts in reference to the sections here quoted are pertinent to the present inquiry.

On the 30th of June, 1864, in the very crisis of the Civil War, Congress passed three enactments known respectively as Chapters 171, 172 and 173, Statutes of 1864, which severally had for their purpose the raising of money by the Government to satisfy the enormous demands of the war.

Chapter 171 was an act to increase duties upon imports. Chapter 172 was an act to provide ways and means for the support of the Government by issuing bonds and making loans. Chapter 173 was an act to provide internal revenue to support the Government, to pay the interest upon the public debt, and for other purposes.

From the last of these acts, Sections 3407 and 3408 of the Revised Statutes, which we have quoted above, are taken.

Section 3407 is found in Section 79 of that Act (Chapter 173), and, as we have seen comes under the general head of "licenses." By referring to Section 79 in that act it will be seen, that the whole purpose and object of that section was to raise revenue by the granting of licenses, that is, by way of a personal tax upon certain *individuals* engaged in certain occupations therein specified. It did not describe *property* to be taxed. In subdivision 1 of that section we find the exact language used as in Section 3407 of the Revised Statutes, to define *who* shall be included under the term "banker." In subdivision 9 under that section there is a definition of *who* shall be included under the term "broker"—both bankers *and* brokers being subjected by Section 79 to a special tax or a license fee, bankers paying $100 for such license and $2 additional for every thousand dollars in excess of $50,000 capital, and brokers a license fee of $50. The definition of a broker in subdivision 9 of Section 79 is as follows: "Every person, firm or company except such as hold a license as a banker whose *business* it is as a broker, *to negotiate purchases or sales* of stocks, exchange, bullion, coined money, bank notes, promissory notes or other securities for themselves or others, shall be *regarded as a broker* under this act"

By Section 99 of said Chapter 173, it was enacted that in addition to paying the license fee or personal tax above referred to, brokers should be subject to a

tax upon their *business*. The language of that section is as follows:

"And be it further enacted that all brokers *and* "bankers boing business as brokers, shall be subject "to pay the following duties and rates of duty upon "the sales of merchandise, produce, gold and silver "bullion, foreign exchange, uncurrent money, promis- "sory notes, stocks, bonds or other securities as here- "inafter mentioned, and shall be subject to all the pro- "visions where not inapplicable thereto, for the re- "turns, assessment, collection of the duties and liens "and penalties as are prescribed for the persons, firms, "companies or corporations owning or possessing or "having the management of railroads, steamboats and "ferryboats; that is to say, upon all sales of mer- "chandise, produce or other goods one-eighth of one "per centum; *upon all sales and contracts for sales of* "*stocks and bonds one-twentieth of one per centum on the* "*par value* thereof; and of gold and silver bullion and "coin, foreign exchange, promissory notes or other "securities, one-twentieth of one per centum on the "amount of such sales and of all contracts for such "sales."

In section 110 of said act (Chapter 173, Laws of 1864), we find the provision that in addition to the license fee or personal tax upon bankers, that act imposed a tax upon the *business of banking*. It was in the following language:

"And be it further enacted that there shall be levied, collected and paid a duty of one-twenty-fourth of one per cent. each month upon the average amount of the *deposits* of money, subject to payment by check or draft, or represented by certificates of deposit, or otherwise, whether payable on demand or at some future day, with any person, bank, association, company or corporation engaged in the business of banking; and a duty of one-twenty-fourth of one per cent. each month as aforesaid upon the average amount of the *capital* of any bank, association, company, corporation or person engaged *in the business of banking* beyond the amount invested in United States bonds."

And the section then goes on to provide a tax upon the average amount of *circulation*, and that a true and accurate return of the amount of circulation of deposit and of capital shall be made and rendered each month.

By Chap. 184, Stats. of 1866, the character of these provisions of the Act of 1864 which is above quoted was substantially retained, and re-enacted: The language, however, of Section 110, which read: "Duty of * * * upon the average amount of the capital of any bank, &c., or person engaged in the business of banking," was by this act changed to read, "A tax of * * * upon the capital of any bank, association, company or corporation, and *on the capital employed by any person in the business of banking, &c.*"

By Chapter 255, Stats. of 1870, it was enacted that on and after May 1st, 1871, special taxes imposed by the 79th section of the Act, Chap. 173, approved June 30, 1864, as amended by Section 9 of Chapter 184 approved July 13, 1866, &c., be, and the same are hereby repealed.

SECTION 2. "And be it further enacted that on and after the first day of October, 1870, *the special taxes on sales imposed by the internal revenue laws now in force*, saving and excepting such taxes on sales as are by existing law paid by stamps, and 'the taxes on sales of leaf tobacco, manufactured tobacco, snuff, cigars, foreign and domestic distilled spirits and wines, imposed by said Act approved July 20, 1868, and Acts amendatory thereof, be, and the same are hereby repealed."

In Chapter 315, Statute of 1872, Sec. 37, it was provided, among other things, "The words 'capital employed in said section' (that is Section 110, Chapter 173, Act of 1864, as amended by Chapter 184, Laws of 1866) "shall not include money borrowed or received from day to day in the usual course of business from any person not a partner of, or interested in, the said bank, association or firm." This proviso in the Act of 1872 was enacted in order to escape further contro-

versy, such as is represented in the opinion of the Circuit Court, 12 Blatchf., 161, in the borrowed money cases (affirmed in Clark vs. Bailey, 21 Wallace, 285); and by the case of Oulton vs. Savings Institution, 17 Wallace, 109, by which said Section 110, Act of 1864, was held to subject savings banks having a capital stock, to the tax provided in said section.

Then in 1873–4 came the revision, and all that remains of these provisions is by that revision embodied in Sections 3407 and 3408, which we have quoted above.

(*c*) This Court has said that *in construing the revision* the *old statutes are to be followed* as they have been construed, the purpose being only to abbreviate, *unless a different purpose is shown by a substantial change in the phraseology (McDonald vs. Hovey, 110 U. S. Rep., 620).*

"It will not be intended that the Legislature, *in revising and consolidating the laws*, intended to *change their policy*, unless such intention be clearly expressed" (U. S. vs. Ryder, 110 U. S., p. 740).

VI.

Summary of Legislation.

It will be seen, therefore, by the foregoing recital that Congress originally enacted a tax upon four distinct objects, and defined with all the precision that language was capable of what it meant by two of those objects.

It thus appears that under the head of "Licenses," Congress, in Section 79, Act of 1864, defined the per-

sons who by this legislation were to be considered bankers, and then imposed a personal tax upon the banker in the shape of a license fee or special tax.

Then, in Section 79, it also defined who was to be considered by this legislation a "broker," and imposed a personal tax resulting from the occupation of the broker in the shape of a license fee or special tax. In Section 99, same Act, under the head of "Brokers," Congress also imposed a further tax or duty upon *all sales and contracts for sales* of the several descriptions therein mentioned. In Section 110 of the same act, under the head of "Banks and Banking," Congress also imposed a duty upon the *capital*, the *deposits*, and the *circulation* of banks and bankers. This might be deemed a *property* tax in contradistinction from a *personal* tax. In 1870 Congress expressly repealed the special taxes imposed by Section 79, and *all taxes on sales* not excepted. This, of course, included *all the sales* mentioned in Section 99. In 1872 Congress said borrowed money of bankers was not taxable;—thus limiting the tax on banking properties.

Then by the revision Section 3407 and Section 3408, we have retained in the statute the definition given in Section 79, of who shall be considered a banker under this legislation, and the tax upon the circulation, the deposits, and the capital employed in the business of banking contained originally in Section 110, Act of 1864, as subsequently amended. Only the *property* tax is retained.

It will also be seen that the attempt, in the case at bar, to tax the capital employed by brokers in *their* business of buying and selling stocks, &c., as capital employed by them in the *business of banking*, under Section 3408, Revised Statutes, results in ignoring the distinction originally recognized in the revenue laws between *brokers* and *bankers* and their *business;* and in effect affixes a tax which Congress had never authorized. Congress had taxed bankers' capital and brokers' sales.

It was *never enacted that brokers' capital should be taxed;* and because Congress saw fit to repeal the enactments taxing brokers' sales, cannot afford any warrant for holding that *brokers'* capital has become *bankers'* capital, when previously the employments had been treated as distinct and different avocations; and separate schemes of property taxes for each pursuit had been outlined.

So, also, with reference to the "margins" left with brokers by their customers. Such margins are not and cannot reasonably be called "deposits" in the hands of bankers, because the persons with whom they are left are not bankers, and these margins are not "deposits with bankers, subject to draft, &c." And this was the official usage.

The foregoing taxes upon the par value of brokers' sales covered and embraced (if the broker actively employed his capital) both his capital and the margins in his hands, and what he borrowed besides to carry his stocks. This was repealed; and such repeal should not be neutralized, and the tax in part restored by such a construction as is here contended for in support of the Commissioner's unwarrantable assessment of the taxes in controversy.

VII.

Same Topic Continued.

It was, at one time, therefore, essential under the Acts of Congress to ascertain, for the purpose of determining a banker's license fee, how much capital was employed in his business of banking, as distinguished from his broker's business, if such there was, out of which there arose a tax on brokers' sales. It was in this connection that the statutes, from which Section 3407

is preserved, described who were bankers; and to the extent that the same persons paid taxes on *sales* of stock *for others* they were declared and *held to be brokers* and not *bankers*.

That there were bankers doing business as brokers, and brokers doing business as bankers, and hence persons subject to taxation in both instances as bankers *and* brokers; and that there were persons subject to taxation as brokers who were *not* bankers, as well as bankers who were *not* brokers, serves to emphasize from legislative and administrative sources the actual distinctions existing according to our common knowledge and likewise preserved by the Revised Statutes.

In *Clark vs. Gilbert, 5 Blatch., 333*, it was decided that so far at least as the plaintiffs purchased stocks or bonds for their customers, whether they used for the purposes of such purchase their own moneys or the moneys of their customers, or moneys borrowed from others, either on their own securities or on securities borrowed from their customers, they acted as *brokers*, and not as *bankers;* and that this portion of their business was outside of the business of a banker as defined in Section 79, and came directly within the business of a *broker*, and was subject to a tax as such, under Section 99 of law as it was then applicable. The *banker* "besides carrying on his own business, may also engage in the business of a *broker*; but in such case and as respects the *business* done *as a broker*, he must *pay* the tax imposed over and *above* what he has already paid *as a banker*."

In *Peabody vs. Gilbert, 3 Blatchf., 334*, the distinction is thus stated: "The plaintiffs are *bankers*, and do business as such by receiving stocks, bonds, &c., for sale, and by lending and advancing money on stocks, bonds, &c., and in default of payment, sell the same, and also purchase and sell stocks, bonds, &c., on their own account *and not on commission or for others*. They *also* purchase and sell stocks, bonds, &c., *for others*,

*under certain stipulations as to risks, losses and profits, which is the business of a broker * * * "*

In *U. S. vs. Fisk, 3 Wallace, 445*, it was said: "Now a banker pays a much higher license tax than a broker, and is permitted to prosecute or carry on *the business or profession of a broker* without paying any further license; but if he prefers, he may not combine that business with his own." The distinction requiring a separate license did not disappear, because, the license fee and the tax on brokers' sales were abolished. The distinction is preserved and the tax made applicable only to the *deposits*, the *circulation* and the defined *capital employed in the business of banking.* A limited tax on banking property only is retained.

It seems, therefore, that Congress, and the Courts, as well as the administrative officials and the taxable community repeatedly recognized and adhered to the common distinctions existing between the avocation and current transactions of *brokers*, and the avocation and current transactions of *capital employed* in the *business of banking.*

VIII.

Illustrative instructions issued from the Internal Revenue Bureau.

If the definitions of Section 3407 are to be conclusive in *one* way, as expositions of the business of banking, then they must *exclude* all other definitions; so that capital employed in a business *other* than one of those three ways described in the statute, is not taxable. Hence the *broker* is not taxable.

There are three essentials indicated by the three subdivisions of Section 3408 as declared features of the

business of banking, namely, *deposits, capital* and *circulation.* None of these are essential appurtenances to the business of a *broker.* It is not the "banker" who is taxed, but the *capital employed* in the *business of banking.* To become the subject of taxation the capital must be employed in one's general business, and in a place or places of business where the statutory requisites are fulfilled, and in one or more of the methods described in the statute; and this employment must constitute the prominent feature of the business and of the avocation of the persons there employed. It is not the employment of the capital in a business to which one or more of those ways is incidental; but it is where there is an "employment" and a general "business" as a part of such employment. Both words *employed* and *business* imply continuity. Now, brokers do not *employ capital* in those ways described in the statute. They *buy* and they *sell.* Their *business* is not to *loan*; but, as an incident to a purchase, they negotiate a loan for their customers, and may do so either in their own name or otherwise. Now, *to sell* requires no capital, and none is used. But to buy, *money* must be paid, and this money must be procured, either on the broker's credit or on his own or his customer's securities or otherwise. To do these things constitutes the broker's business. It may or may not utilize a permanent capital. If it does, such capital is not used in a banking business, but in aid of the stock broker's business, to earn commissions on purchases and sales. The broker is the negotiator, the medium, the factor, through whom the principals, disclosed or undisclosed, may contract. Brokers sometimes directly from customers receive certificates to sell; but that is rare, and is an infrequent incident to their general business; and in such cases no capital whatever is employed. Altogether a broker may, if in good credit, transact extensive business and employ absolutely no capital whatever in conducting it.

If two persons agree to become copartners in the

business exclusively of stock brokerage, would it not be in violation of the copartnership articles for one partner to use the partnership capital in carrying on the business of banking?

If a broker is to be taxed on his broker's capital because in theory the customer is charged on the broker's books with the payments made by the broker for his customer's stocks, and that therefore such payments are to be treated as loans, and the broker thereby converted into a banker, then why not tax the broker on the customer's credits with him as if customers' deposits, and subject such deposits to taxation under Subdivision One of Section 3408; for they are as much deposits made in the business of banking as the broker's capital is employed by him in the business of banking? The reason is that the broker is not a banker, and such credits are not deposits with a banker.

The true legislative rule in this respect has been indicated by the Internal Revenue Department in its *general* instructions, and by the Courts when corporations were to be treated, and when in such cases the actual *capital employed* in their *business*, and the nature and character of the business itself was the subject of ascertainment. Individuals and private bankers should be measured by the same standards, viz., by their distinguished general *business*. Note by way of illustration some of the instructions in force during the time of the taxes in question, as issued by the Commissioner of Internal Revenue:

"13. The 'average taxable capital' of any bank, association, company, or corporation engaged in the business of banking, is the 'average capital' less the 'average amount (of capital) invested in United States bonds.'"

"The 'average capital' must be made up for each month by averaging, as in the case of deposits, from daily statements—the basis in the case of banks, associations, companies or corporations, being the capital *paid up*, and in the case of private bankers operating

with no established capital, the capital *employed* in the business of banking."

"The average amount of capital invested in United States bonds must be ascertained by averaging the amount invested in interest-bearing obligations of the United States, owned and held by the bank at the close of business each day during which business is done." * * *

"An *incorporated bank is liable* to taxation upon the amount of *capital fixed* in its charter. The *undivided surplus* profits of an incorporated bank are *not liable to taxation as capital*, nor as deposits." * * *

"When the *capital of a banking firm*, as fixed by the articles of copartnership, has been diminished by ascertained losses, or otherwise, returns should be made for that portion which remains."

"*Surplus profits*, when determined, apportioned, and carried to the credit of the several members of a banking firm as an additional amount *invested* by them *in the banking business*, or, without being apportioned, suffered to remain for the purpose of being regularly employed in such business, should be returned for taxation as a part of the capital of the banking firm."

"But surplus profits carried to the credit of the individual members of the firm, subject to payment by check or draft, or represented by certificates of deposit, or otherwise, are deposits subject to taxation." * * *

"Where a banker borrows money upon the pledge of stocks or bonds for the purpose of completing payment for the same stocks or bonds, the money so received cannot be treated as a deposit within the meaning of the statute." * * *

(See Form 67, issued by Internal Revenue Bureau, 1881, for "semi-annual return of monthly amount of circulation, of deposits, of capital, of notes paid out.") This form itself indicates "deposits" or "circulation" or "capital" as essential factors of the "business" therein made subject to the banking tax.

In the absence of any circulation, the description in these blanks calling for bankers deposits taxable (under Subdivision One, Section 3408) indicate features of the

"business" which render it the subject of the tax; it says as to deposits:

"The items of capital and deposits must be stated separately on the appropriate lines, and in no case must they be aggregated as capital and deposits." * * * Without *deposits* or *circulation* or *capital* how could one do the business of banking? And because a *broker* who may have neither chooses to fortify his credit with some capital is he any the less a broker as distinguished from a banker?

There is no room within the lines of these official descriptions for the business of a stock broker as described in the case at bar; and the substantial fortification by capital of that *credit* which gives and retains for him customers is not taxable as permanent banking capital.

IX.

The case of Selden vs. Eq. Trust Co., 94 U. S., 420.

This Court has examined into what constitutes the "business of banking," and has distinguished between capital so employed and capital employed in a business where some of the transactions bear an apparent similitude to the *business of banking.* It has declared that the incidents to a business, such as advancing or loaning money on bonds, did not, *per se,* render the *business* taxable; but that it was "*the method or mode of operation which was in view*" by Congress. "To us," says Mr. Justice STRONG, "therefore, it appears plain that *it is the business* of advancing or lending *in the mode usual with bankers,* that is, on collaterals or on the pledge of personal property, that by the statute is defined to be banking within the intention of Congress."

The distinction is made between one who is an owner of securities and one, the banker, holding them without any right of ownership; and between one loaning his own money and a banker loaning generally as part of his business. And it was held that a corporation which did not collect or receive "any deposit of money subject to be paid or remitted on draft, check or order, nor does it receive deposits, issue notes, or make discounts of any description whatever, nor do any other business" except to invest in bonds and to sell them with a guarantee, was not taxable as one whose capital was employed in the business of banking.

To quote, for convenience, from the opinion:

"The statute describes three classes of artificial and of natural persons, distinguished by the nature of the business transacted by them, and declares that individuals embraced in either of the classes shall be considered bankers. The first class is composed of those who have a *place of business* where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check or order. It is not claimed the company engaged in that branch of *business* or that they are included in this first class. The agreed state of facts expressly repels any such claim.

The second class are those who have a *place of business* where money is advanced or loaned on stock, bonds, bullion, bills of exchange, or promissory notes It is contended on behalf of the plaintiff in error that the company is included in this class, because it advances or loans money on bonds. The case, however, states that all the loans the company makes are investments of its own capital in mortgage securities on real estate. It is true the bonds of the borrowers are taken with the mortgages, but the bonds are mere evidence of the debt. The money is advanced or loaned on the security of the real estate mortgaged and not on the security of the bond. We think Congress, in the clause of the act we are now considering, intended reference to transactions entirely different from loans or advances made on the personal promise or undertaking of the borrower. *The words used are not technical. They are, therefore, to be*

understood in their common and popular sense (Dwarris on Statutes, 573). And that in common understanding an advance or loan of money on stocks, bonds, bullion, bills of exchange, or promissory notes is an advance or loan where those species of property are pledged as collaterals or are hypothecated to secure the return of the advance or the payment of the sum lent, is unquestionably true. It can be nothing else where the money is advanced or lent on stocks or bullion, and by the statute bonds, bills of exchange, and promissory notes are placed in the same catalogue with stocks and bullion. All of them are alike the subjects on which the advance or loan is made. It is a fair presumption, therefore, that Congress regarded an advance or loan on bonds as similar in its character to an advance or loan on stocks, involving in each case an hypothecation of the subject on which the advance is made. If not so, if it was intended to embrace loans generally, there was no necessity for introducing the qualifying words "on bonds, bill of exchange, or promissory notes." It was, however, not the lending, but the *method or mode of operation* which was in view. If it was mere lending Congress had in contemplation it is difficult to conceive of a reason why mortgages of real estate were not included with stocks, bonds, bullion, &c. But it is well-known common usage for banks to make advances or loans on the hypothecation or pledge of such property, though not upon the hypothecation or mortgage of real estate. There was a reason, therefore, for omitting real estate from the catalogue of things upon which the advances or loans contemplated might be made. Advances on that are not within the *ordinary business* of a banker. To us, therefore, it appears plain that it is the business of advancing or lending in the mode usual with bankers—that is, on collaterals or on the pledge of personal property that, by the statute is defined to be banking, within the intention of Congress, and that lending upon mortgages of real estate is not intended.

The third class described by the statute comprises those who have a *place of business* where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale. The language is not "where stocks, bonds, &c., are sold," or "are held for sale." Surely Congress did not intend that corporations

or persons who have a *place of business* where they sell their own stocks, bonds, bullion, bills or notes should be regarded as bankers. *If they did a vast proportion of the corporations and of the merchants and manufacturers of the country would be included.* But the language of the statute is " where " such property is " received for discount or for sale." The use of the word " received " is significant. In no proper sense can it be understood that one receives his own stocks and bonds, or bills or notes for discount or for sale. He recieves the bonds, bills or notes belonging to him as evidences of debt though he may sell them afterwards. Nobody would understand that to be banking business (*Selden vs. Eq. Tr. Co., 94 U. S., 420–422*).

Now, the *broker* does not *receive* stocks and bonds either for discount or for sale. He receives them upon a purchase of and payment for them, and he delivers them to his customer or disposes of them according to his customer's order. In no sense is his *business* to receive securities for discount or for sale ; or to loan money upon them. Such occurrences are rare and purely incidental to the business out of which he makes his profits, namely, the *buying* and the *selling* of stocks and bonds. He may resort to any legitimate shift to carry on this business, and yet not constitute such shift his general business. One would not designate a pawnbroker as a banker, nor would the *business* of a pawnbroker and the capital employed in such a business be correctly denominated the business of banking and the capital *employed* in the business of banking.

X.

A Case on all Fours.

With the case at bar, and tried in the same circuit before the Court (jury being waived), was the case of

John V. Bouvier and another vs. Marshall B. Blake, in February, 1883. In this case, which is not reported, the plaintiffs were members of the Stock Exchange, and carried on the business of brokers in that connection; and as they did not do a banking business, and as the Court decided were not bankers, it is apparent that the testimony in the nature of the case could not differ in substance from the testimony in the case at bar. In a memorandum of Judge COXE, dated March 28th, 1883, in respect to this case he said: "It seemed to me that the proof clearly demonstrated that the plaintiffs were brokers simply dealing with other people's property for a stipulated compensation. Although there may have been an occasional transaction which brought the case witnin the language of the Supreme Court defining the meaning of the statute under consideration, yet the Court would not for this reason be "justified in characterizing plaintiffs' general business as that of banking. It was not, in my judgment, the intention of Congress to impose a tax upon persons as bankers who simply buy and sell stocks for others upon the exchange. Any opinion I might write would be but an elaboration of these views."

It is proper under the circumstances to quote from the findings on file in the Circuit Court (S. D. N. Y.) signed by Judge COXE in that case, and the following "findings of fact" are extracted:

"That the business of the plaintiffs consisted in purchasing or selling in the Stock Exchange in the City of New York, on behalf of such persons as might employ them for such purpose, such stocks or securities as are borne upon the list of the said Stock Exchange, and that they made no transactions on their own account or at their own risk."

"The said plaintiffs formed a capital of $ ..... but the same was not used in the active transactions of their business, but was retained on deposit in the bank where plaintiffs' accounts were kept, as a reserve fund,

and as security for such certifications of checks as the plaintiffs might require in the courts of their current business during the day, until the accounts of their customers were closed at the end of business hours."

* * *

" That the plaintiffs had not a place of business where credits were opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check or order."

" That the plaintiffs did not have a place of business where money was advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes."

" That the plaintiffs did not have a place of business where stocks, bonds, bullion, bills of exchange or promissory notes were received for discount or for sale, except customers would sometimes bring stocks there for the purpose of having them sold on the Stock Exchange, which stocks were there received by the plaintiffs for that purpose."

Upon the foregoing " findings of fact " his Honor Judge COXE founded the following " conclusions of law : "

" That the plaintiffs are not brokers as described in Section 3407 of the Revised Statutes of the United States."

" That no part of the capital of the plaintiffs is employed in the business of banking as the same is described and in the statutes last above referred to."

" That the taxes to recover which this action was brought were improperly levied and collected and without authority of law."

" That the plaintiffs are entitled to judgment," etc., etc., etc.

Of course, this case of Bouvier vs. Blake is not cited to this Court as an authority; but it is entitled to the considerations exposed by its record. Moreover, the circumstance is entitled to be mentioned that Judge COXE of the Northern District of New York, holding

the Circuit Court in New York City, in February, 1883, had thus decided contrary to the view taken in the case at bar by Judge WHEELER, District Judge for Vermont, who presided at the trial in the same Circuit, at New York City, in the case at bar, December, 1885.

XI.

The evidence should have been submitted to the jury.

It was error for the Court to direct a verdict for the defendant, instead of submitting the evidence to the jury.

The rule in this respect is well settled by repeated adjudications of this Court, extending from 9 Peters, 292 to 112 U. S., 615. It is for the jury to say what is the effect of the testimony and not for the Court; hence an instruction founded on part of the evidence was held to be error (Greenleaf vs. Birth, 9 Peters, 292).

In *Connecticut Mutual Life Insurance Company vs. Lathrop, 112 U. S., 615*, it was said: "Where a cause fairly depends upon the effect or *weight* of testimony, it is only for the *consideration and determination of the jury* under proper directions as to the principles of law involved. It should never be withdrawn from them unless the testimony be of such a conclusive character as to compel the Court in the exercise of a sound legal discretion, to set aside a verdict returned in opposition to it;"—(quoting from 106 U. S., page 32). "The *weight* of evidence is for them (the jury) and not for the Judge to pass upon." *Ib.*, 615.

If the jury might draw an *inference* from the proofs, the case should not be taken from them. *Schuchardt vs. Allen*, 1 *Wall.*, 359. And where the evidence is

conflicting, it is error to direct a verdict for the defendant (*101 U. S., 708*); and to the same effect is *94 U. S., 284*, where the rule is explained and the leading authorities cited. A direction for a verdict can only be given where there is *no* conflict of evidence (*19 Wall., 433*).

If, therefore, from the proofs in this case, the jury might fairly *infer* that the plaintiff was taxed on a capital which was *not* employed in the general business of banking, either as described in the statutes, or as recognized in the ordinary or commercial description of those terms, then it was undoubtedly error to direct their verdict against or in spite of any legitimate proofs to this effect. The strongest way to put the case against the plaintiff is, for the sake of argument, to concede that the proofs may have exhibited a mixed question of law and fact, in which case the proofs should have been submitted with proper instructions, and not withheld from the jury by a direction for a verdict for the defendant. See also *105 U. S., 347*.

Nor does it require two witnesses to constitute a controversy over the inferences to be drawn from testimony. One witness may testify in such a way as to render it the duty of the Court to submit his evidence to the jury to determine the inferences of fact justifiable from his story. It frequently occurs that different pieces of the testimony of the same witness are found to be irreconcilable or of a character to destroy any inference of fact from the entire testimony of the witness, and it sometimes occurs that a jury would be justified in disregarding entirely, for incredibility, or for some other reason, portions of testimony delivered, or it may be the entire testimony of a particular witness. It is the function of juries to discriminate between witnesses or portions of testimony, and not for the Court to characterize one segment of competent evidence so as to out weigh the rest. At all events, in the case at bar, there is recorded testimony that the busi-

ness of plaintiff in error,—that of a stock broker, " was a well defined avocation. It consisted in buying and selling stocks for customers, and carrying them by borrowing money for customers to carry those stocks on. That occupation was carried on by a great many members of the New York Stock Exchange; there are some bankers in the New York Stock Exchange, but the business carried on there, as a rule, is that of the stock brokers. * * * Q. Were you engaged in any other business except that of stock broker at that time? A. None whatever" (Rec., fols. 31, 32). There are " houses in other lines of pursuit." * * * —persons who are called in Wall street bankers" (Rec., fol. 55). Here is some testimony which, either with or without other testimony, may justify the inference of an actual distinction between *bankers* and *brokers*, and that the plaintiff in error was not in the banking business, and had no capital employed in such a business, which, if it be the fact, invalidated the tax sued for.

The question in this respect is: Was it not error for the Court, instead of explaining what business and what capital was taxable, and of instructing the jury to ascertain from all the evidence, whether the business in question was included within such description, to direct absolutely the denial of that inference, and to refuse plaintiff in error any benefit from the testimony by an arbitrary verdict directed for the defendant? See the exception to this direction, Record, page 26, and the exception to the refusal of plaintiff's request " to submit the evidence to the jury"; and to the further refusal of the Court to submit any of the questions arising upon the evidence; and separately detailed on pages 26, 27, 28 and 29 of the Record.

XII.

Competent Evidence Erroneously Excluded.

The Court erred in excluding a valuable portion of the proofs tendered below in plaintiff's behalf. The plaintiff was asked: "Q. Did you have any capital employed in the business of banking?" The question was excluded under exception. The witness was then asked: "Q. Did you have any capital employed in any other business except stock brokerage?" The question was excluded under exception, and the witness was asked: "Q. Were you engaged in any other business except that of stock broker at that time?" The testimony under this was likewise excluded under like exception, plaintiff's counsel contending for the right "to negative any possibility that he (plaintiff) was in two or three businesses at the same time." (Rec., p. 11).

Plaintiff's counsel offered evidence in response to the following question: "Q. Is it a fact, that there is a class of houses known as banking houses in the mercantile community?" * * * It was contended that evidence was admissible as to what was in fact the ordinary or commercial significance of the statutory terms "business of banking" or "the capital employed in the business of banking;" that it was competent for witnesses to testify "whether or no there was an avocation that was well defined as a business by itself that was accepted in the commercial world as the business of banking." * * * And that "testimony should be received to show that in the commercial community the business of banking was an identifiable occupation and avocation; not that it shall be described by one witness or by two, but that the statutes shall be so far illuminated by testimony as to enable the jury to determine whether, according to the general tenor of the commercial world, the plaintiff's particular avocation which had been taxed was the class of business recog-

nized as banking." It was further claimed that such testimony was the legitimate province of the re-examination of the witness in the light of the cross-examination that had just occurred. All this was excluded under exception (see Rec., fols. 58 and 55), and error is assigned upon these exceptions.

It would seem that the right of a party to explain his own business in the light of the commercial understanding of his avocation, and in the light of the commercial or ordinary signification of the statutory terms of description, was a right that could not be foreclosed by the responses upon cross-examination or by any other particular piece of testimony. It might be that such testimony when received would prove of little or no value to the jury under proper instructions from the Court; but *the right*, nevertheless, *to introduce testimony of this character* is submitted as an absolute one in the case at bar; and a right, which, as the record exhibits, was repeatedly and in various forms refused. This refusal is assigned for error.

With this refusal is coupled the further refusal of the Court to receive testimony tending also to describe the business of stock brokers as carried on in the City of New York. Surely, it cannot be correct to limit the descriptions in these respects to the evidence of a single witness, and that witness the party in interest? A competent witness was, therefore, asked: "Q. Are you familiar with the usages in the conduct of the stock business in the City of New York, and if so, from what causes and experience?" and testimony was offered by him "to show what the general business was of stock brokers, as carried on in this country for many years." The offer was to prove "what was in fact the general avocation of stock brokers in the City of New York" during all the time covered by the acts of Congress upon that subject (Rec., fol. 64).

Testimony of this kind was excluded under exception and error is assigned.

It was then proposed to prove the usage of the Internal Revenue Department prior to June 22, 1874, the date of the Revised Statutes; and evidence "respecting the classification by that Department of persons doing business as stockbrokers and persons doing business as bankers or who had capital employed in the business of banking," was excluded. For this, error is also assigned (see Rec., p. 25). In respect to this last exclusion the rule of law has long been recognized that the official procedures of administration, while not controlling upon the judiciary department, are entitled to "respectful consideration"; and if this be so, direct evidence of the administration of the statute by the Internal Revenue Bureau in a case not too remote would seem to afford the most efficacious method of such "respectful consideration." We have here an offer to prove the construction of the Department which had been followed for many years without any attempt "of any other department of the Government to question its correctness except in the present instance." Speaking of such a case, this Court, in *Robertson vs. Downing, 127 U. S., p. 613, said:* "The *regulation of a department* of the Government is not, of course, to control the construction of an Act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation and by it rights of parties for many years have been determined and adjusted, it is *not to be disregarded without the most cogent and persuasive reasons.*"

The offer related to a direct and not to any remote fact; and sought to show the precise official classification of the business described in the statute, and of the very business described in the testimony. It would seem that under the authority of *U. S. vs. Hill, 120 U. S., 168*, applied in the last cited case, the exclusion of such testimony was error. This Court has frequently said that even in the case of a "doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into

effect is entitled to great respect" (*Hahn vs. United States, in 107 U. S., 107.* The Government's *objection* was not to the quality or degree of the testimony, but *to any testimony whatever* in the line of the inquiry indicated at the foot of page 25 of the record. Surely any fact not too remote directly concerning the usage and the business at the time of the legislation in question, particularly when that usage is a part of the official administration of the statutes incorporated in the revision, would seem to furnish competent evidence for the consideration by the jury under proper instructions from the Court, as to how such evidence should be weighed.

Similar reasons apply to the errors assigned for the exclusion of the evidence offered on the part of the plaintiff in description of the class of "houses known as banking houses in the mercantile community;" and the further description as proffered that "there was an avocation that was well-defined as a business by itself, that was accepted in the commercial world as the business of banking." This evidence, it is submitted, should have been received.

XIII.

For the foregoing reasons, and because, either in point of law or in point of fact, there is no justifiable ground in transferring the distinctive business of a stock broker to the separate domain of the banking business, it is respectfully submitted that upon the errors assigned the judgment should be reversed and a new trial awarded.

New York, November, 1889.

HENRY EDWIN TREMAIN,
MASON W. TYLER,
For plaintiff in Error.

Office Supreme Court U. S.
FILED,
DEC 19 1889
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

DAVID RICHMOND, PLAINTIFF IN ERROR,
vs.
MARSHALL B. BLAKE, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND COLLECTION DISTRICT OF NEW YORK. } No. 171.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

In 1884 David Richmond brought an action in the circuit court of the United States for the southern district of New York against Marshall B. Blake, as collector of internal revenue, to recover certain sums of money which he had paid as taxes, the same having been charged against him as a banker under the internal-revenue laws,

and which he contends were unlawfully and illegally assessed and collected.

The defendant filed his answer, and the cause came on for trial before the court and a jury, the Hon. Hoyt Wheeler sitting as a circuit judge.

After the testimony of the plaintiff had been introduced and he had rested his case, the defendant, by his counsel, moved the court to direct the jury to render a verdict in favor of the defendant. The motion was granted, and a verdict rendered accordingly.

Thereupon a bill of exceptions was prepared, signed, and made part of the record. The bill of exceptions purports to set forth the entire testimony offered by the plaintiff. The motion of the defendant was therefore somewhat in the nature of a demurrer to the evidence, and raised the question whether, upon the evidence as given, the plaintiff was entitled to a verdict.

The taxes assessed and collected against the plaintiff were assessed and collected upon the ground that he was a banker, as defined by the internal-revenue laws of the United States.

Other questions were made in the answer of the collector which it is unnecessary to consider here, as they were decided adversely to the Government. The real and only material point in controversy was whether Richmond was a banker. In the opinion of the court, the testimony as given brought him within the provisions of the law and subjected him to such taxation.

The cause now comes on for hearing upon a petition in error to reverse the action of the circuit court.

BRIEF OF ARGUMENT.

I.

Was the plaintiff a banker?

Section 3407 of the Revised Statutes of the United States reads as follows:

> Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker.

It will be seen that the definition given by the statute includes a great variety of transactions.

A person is a banker within the meaning of the statute;

First, If he has a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order; or

Second, Where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes; or

Third, Where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale.

An examination of the testimony as set forth in the bill of exceptions, and especially as it appears in the cross-examination of the plaintiff himself, clearly shows that he was engaged in a business which is described and

covered by each and every clause of the section above referred to.

In stating the manner of transacting and carrying on his business he establishes the following facts:

He had a place of business, 33 New street, which he particularly describes. He had a capital of from $30,000 to $50,000. His customers deposited money with him. He kept an account with them. If the money deposited was more than enough to meet the "margins" for which the deposit was made, it was subject to be drawn out by the check or draft of the customer. Money was also sometimes advanced or loaned by him to the customer, his security being the stocks of the customer.

In the account kept between them the customer was credited with all sums deposited by him, and interest was allowed on the amount of such deposits; and when money was advanced by the plaintiff, he charged the customer with interest on the amount so advanced. This money was advanced by the plaintiff on stocks.

The plaintiff was also in the habit of receiving for discount and sale stocks and bonds.

For the purpose of directing attention to certain points made by the evidence a few quotations are here presented. On pages 15 and 16 of the record, the following appears in the testimony of the plaintiff:

Q. Do you keep an open account with your customer?

A. I do.

Q. On your ledger?

A. Yes.

* * * * *

Q. Do you credit him with the amount of the margin which you receive?

A. We credit him with the amount; if it is money, he receives credit for it; if it is securities, he receives credit, of course, for that.

Q. Do you charge him with the cost price of the stock purchased pursuant to his order?

A. I do.

Q. And do you charge him with the interest on the difference between the cost price of the stocks and the amount of his margin?

A. I do.

Q. How is your difference settled?

A. He receives interest on the amount placed to his credit, and is charged interest on the amount placed to his debit, which is practically the same. You asked me the way in which it is done, I understand?

Q. Then, instead of deducting the lesser number from the larger number, and then calculating the interest charge to be made to the customer, you make two calculations, debiting one and crediting the other?

A. Exactly so.

Q. And that interest is charged against him up to what time?

A. No stated time; it depends upon whether the stock is sold or not, or whether it is paid for afterwards by him—taken up.

Q. It is charged to him up to the time that he either closes out his account or——

A. Settled in full.

Q. That may be done in two ways, either by selling out the stock which you hold or by paying the amount charged against him on your books as the purchase-money?

A. Yes.

Q. At what rate of interest were your customers charged for these debits against them during the years 1880, 1881, and 1882?

(To which question plaintiff's counsel objected, as immaterial, irrelevant, and incompetent; which objection the court overruled, and plaintiff's counsel duly excepted.)

A. Most of the time at the rate of 6 per cent., but if we had to pay large prices for borrowing money we had to charge extra rates on that account. The rate was never, to my knowledge, less than 6 per cent.; but we did not always charge a higher rate simply because we paid a higher rate. In the spring of 1880 or 1881 money was very active, and at that time we charged more; that was extra. We borrowed money from different banks and bankers; sometimes from individuals outside or sometimes possibly from brokers who happened to have a balance more than they wanted overnight. As a rule, the rate of interest was above 4 per cent.

On page 13 the witness makes the following statement as to the amount of his capital:

Q. How much capital did you have in your business at that time?

A. I have forgotten; it was nothing like $300,000; it ranged from $30,000 to $50,000. It was on that capital that I made the return for taxation; I had in business that amount; it was on that return that I was taxed one twenty-fourth of one per cent. per month, and it is to recover back that tax that this suit is brought.

In detailing the manner of doing business the following appears on pages 13 and 14 of the record:

Q, Now, to return to this transaction, I understand you to say you drew your check to pay for

this stock purchased at a day previous, pursuant to this order made by your customer; that check was drawn on your bank in which you kept on deposit your capital?

A. I say a portion of my capital, or maybe more than my capital; there might have been money of my customers there in my name. As a rule my capital was not all in use; some of it was in the bank.

Q. If your capital was all in use, then a draft would be made against what—moneys borrowed?

A. We had to have some of the capital in the bank.

Q. Assuming that it was all in use?

A. It couldn't be, if some of it had to be in the bank.

Q. Why?

A. Because you have to have a bank balance to draw your check against it.

Q. Couldn't you borrow money and place it in the bank?

A. Borrow that money on your customer's stock for your customer?

Q. Couldn't you borrow that money yourself?

A. Borrow it? Yes, for my customers; on my customer's stocks.

Q. I am asking you about your own account.

A. If I had stocks I could.

Q. You could borrow money and put it in the bank?

A. Yes; if I had good stocks—proper stocks.

Q. As a matter of fact, did you not get discounts at the bank during this period of time?

A. I have had money borrowed at the bank during that time on stocks; but mainly—

Q. Never mind; that is an answer.

A. Almost entirely on customer's stock.

PLAINTIFF'S COUNSEL. No discount?

The WITNESS. No discount, but on loans from the bank. I never had a note discounted in my life.

DEFENDANT'S COUNSEL. I ask to have that portion of the witness's answer stricken out.

The COURT. I don't perceive but what the witness is answering fairly. I don't perceive that he volunteers anything. I understand him to say he borrowed money and put up his customers' stock and, if need be, stock of his own.

The WITNESS. Sometimes.

Q. When would you deliver this stock to your customer who had ordered it?

A. Might not deliver it to him at all; he might sell it out the next day.

Q. He might sell it out the next day?

A. Yes.

Q. Then, in the mean time, you have only received from your customer, first an order to purchase the stock, and second a margin to secure you, and in the mean time you have purchased the stock, drawn your check against your moneys in the bank to pay for them?

A. I then borrowed money to make the bank balance up again.

Q. You have borrowed money?

A. I may have done that meantime.

Q. Or you may not, if your own capital was large enough?

A. But the chances are I would not have enough. As a rule, when the stock purchased was delivered to my cashier, we would draw the check. If my bank balance was lower than it should be I would borrow money sometimes, but not always, by hypothecation of the stock purchased, in order to make up the proper amount again. I might use that stock or I

might use other stock to borrow the money to keep the bank balance up, but I would not go to work and use that stock before I paid for it. The check is paid the next day, as it has to come through the clearing-house first. After the stock was received sometimes we would borrow money on it in the course of half an hour; sometimes it would lie in the drawer for a week, and then borrow money on it.

"Q. Do you have a drawer in which you keep stocks that come into the office?

"A. Not all of them; we keep the bulk of them. Sometimes that stock might be sold by the customer, and would not go into the drawer; the sale might be simultaneous; he might tell me if it went up one point to sell it right out again. If it was not sold I presume it was put in the drawer for the time being. It might be there one or two days, or a week. If we bought a stock for a customer that was not held in very high repute by the banks we might use it to borrow on or might not."

On page 17 of the record the witness gives a further description of his mode of proceeding, and especially as to what is done when he receives orders to sell.

Q. Now, you have described the manner of doing business on orders to purchase, won't you please tell the jury about the manner of doing business when you receive orders to sell?

"A. Sometimes a customer may write us from the country to sell stock, and then he says he will forward it by mail when sold; another time he may inclose it with the order; another time a customer will come into the office with a certificate and say, "Sell this;" another time he may come in and say, "Sell this and I will deliver the certificate to-morrow," and so on. I sell the stock, and when the time

to deliver it to the broker or buyer arrives I deliver it and receive his check for it. If the seller wants the money I give it to him. If he does not want it he may leave the money there over night or two or three days, but that would be only incidental to the business. It isn't my line of business to receive money in that way; it is an incident of the business. When it is left with me the customer in the country does not make a draft on me; I almost invariably send him my own check.

Q. And sometimes otherwise?

A. A customer never drew on me for that sum—never.

Q. Speaking of a customer who comes into your office and leaves an amount there in that way—say for a day or two or a week—does he draw his check on you for that amount?

A. No; never for that kind of favor—never; never had an instance of that kind in my life.

The COURT. You don't hold any funds to check?

The WITNESS. Never, as a rule. We very rarely have checks drawn against us by our customers. If we ever did, it was not in the manner of the general business at all. It was an exceptional thing. No man who ever had stock for sale had drawn the full amount of purchase on that stock—drawn a draft. He might have drawn a few hundred dollars—one or two hundred dollars; something like that.

Q. How as to the sale of stock? A customer comes in with a certificate and asks you to sell it; describe the entire transaction.

A. I go up to the board and sell it; I pay him sometimes that day, sometimes the next, but very rarely indeed when he delivers the certificate of stock. I keep the certificate in the office until I go to the board to sell stock; sometimes until the next day;

sometimes I borrow money on it over night. I keep it in the drawer, or in the safe, or in the desk; it is paid for with money in the bank to my credit by my personal check. In the case of the country customer who sends an order to sell, stating that he will forward the certificate of stock by mail, or as soon as required, I sell the stock and notify him of the sale; then probably he sends me the certificate. I don't send him the money for that certificate before I receive it. This order to sell would probably be sent to my place of business.

* * * * * * *

Q. He is credited on that amount of margin, is he?

A. He is when we get it.

Q. On your books is he debited with anything?

(Plaintiff's counsel here objected. Objection overruled. Plaintiff's counsel excepted.)

A. He is not. Then he gets a credit for the amount of stock that is sold, the amount of money received for it, and we charge him for whatever is paid for the use of the stock; the general custom is to charge for the use of the stock. Stocks might be running flat; he is credited with the interest on his margin; the transaction might be closed at any time by the purchase of the stock for and on account of the customer. On our books he would be charged with the cost of the stock as bought on the board, with commission. Our letting the account stand would depend altogether on the price the stock was bought at and the price it was sold at.

Q. Assuming that there had been an advance in the stock market pending the borrowing and the sale pursuant to the original order and the purchase made for the purpose of closing the transaction, how would the books stand?

The WITNESS. The customer might have bought stock at another office and bring it in. You can not figure on these things except on the actual facts at the time. Suppose, for instance, the stock was sold for ninety and bought back for ninety-five, that would show a loss of about $525, on the supposition that nothing was paid for the use of the stock. His margin would then be encroached upon by just the amount of the difference between the original price sold for and the price paid by us in closing it and the commissions and whatever we had to pay for the use of the stock. If, on the contrary, there had been a profit to the customer, we would be in his debt, then the amount of the margin deposited and the amount of his profit, we would have that to his credit; almost invariably he would be given a check for it, if he saw fit to make his draft upon us; that could be done, of course, but they do not do it; if he did make his draft, I should honor it.

The aforesaid quotations are somewhat disconnected, but whether taken by themselves or in connection with the other testimony, they show that credits are opened by the deposit or collection of money or currency subject to be paid on check, draft, or order, as mentioned in the first clause of the statute; second, that money is loaned on stocks, as mentioned in the second clause of the statute; and third, that stocks are received for sale, as specified in the third clause of the statute.

The money deposited by the customer with the plaintiff, while it is placed there to meet "margins," is, at the same time, subject to be drawn out on check or draft, at least to the extent that it is not required to meet the demand for "margins;" and where there is a profit to the customer, both the "margin" and the amount of the profit consti-

tute a fund which is on deposit with the plaintiff, subject to the check, draft, or order of the customer; and the plaintiff testifies that if a draft were made upon him he should honor it. So, also, the money advanced by the plaintiff to his customers is a loan, upon which interest is charged, secured by the stocks of the customer.

But whatever opinion may be held as to whether the plaintiff's business was described in the first and second clause there certainly can be no doubt as to its being brought within the third. The plaintiff was continually engaged in the business of receiving stocks for sale. Sometimes they were sent to him and placed in his drawer; sometimes they were brought to him by the customer; sometimes the stocks followed the order to sell; sometimes it came with it, and was received at the same time. But, whether sent or brought, they were received by him for discount or sale. This fact is indisputable, and brings him both within the letter and spirit of the statute. There is no chance for construction or argument. The statute is plain and the testimony is equally plain.

The fact that the mode of transacting business as set forth in the testimony shows that bankers may sometimes do business which makes them brokers *also* does not change the liability of the plaintiff. Indeed, the law itself contemplates this very condition of affairs.

II.

There are some decisions of the Supreme Court of the United States, and also of the circuit and district courts, which bear somewhat upon the questions involved in this case, to which attention is respectfully called.

In the case of *Selden* vs. *The Equitable Trust Company* (4 Otto, 419) there is a careful consideration and discussion of what does and what does not constitute a banker, within the meaning of section 3407 of the Revised Statutes of the United States, and in considering the third clause of said section, Mr. Justice Strong uses the following language:

> The third class described by the statute comprises those who have a place of business where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale. The language is not "where stocks, bonds, &c., are sold," or "are held for sale." Surely Congress did not intend that corporations or persons who have a place of business where they sell their own stocks, bonds, bullion, bills, or notes, should be regarded as bankers. If they did, a vast proportion of the corporations and of the merchants and manufacturers of the country would be included. But the language of the statute is, "where" such property is "received" "for discount or for sale." The use of the word "received" is significant. In no proper sense can it be understood that one receives his own stocks and bonds, or bills, or notes, for discount or for sale. He receives the bonds, bills, or notes belonging to him as evidences of debt, though he may sell them afterwards. Nobody would understand that to be banking business. But when a corporation or natural person receives from another person, for discount, bills of exchange, or promissory notes belonging to that other, he is acting as a banker; and when a customer brings bonds, bullion, or stocks for sale, and they are received for the purpose for which they were brought, that is, to be sold, the

case is presented which we think was contemplated by the statute. In common understanding, he who receives goods for sale is one who receives them as an agent for a principal who is the owner.

The case of *Warren and others* vs. *Shook*, 1st Otto, 704, involves a consideration of cases where persons admitted to be bankers became brokers, and were also liable to a tax as such, and contains a statement to a certain extent of what constitutes the business of banking as defined by the internal revenue laws.

See also *United States* vs. *The Bank of Montreal*, 21 Federal Reporter, 236; *Oulton* vs. *Savings Institution*, 17 Wallace, 109.

III.

During the proceedings in this case in the circuit court the plaintiff made numerous requests of the court in the way of special instructions, which he desired should be given to the jury, and which were refused and exception duly noted. It is unnecessary to consider these instructions here. They became immaterial if the court was right upon the main question presented. There is no controversy as to the amount of the tax, provided the plaintiff was subject to any tax at all. And the proof having shown that he was a banker, particular instructions or special findings became unnecessary. The substance of the matter was arrived at and was disposed of by the court.

ANSWER TO POINTS MADE IN THE BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

Since the preparation of the foregoing brief, and after the same was in the hands of the printer, there has been handed us the brief of counsel for plaintiff in error, filed on the 16th of December, 1889. While preparing our own we were in ignorance of the points relied upon by the plaintiff, except so far as they are disclosed by the record. It is now impossible, for want of time, to answer the brief of learned counsel with any measure of fullness, but we respectfully call attention to some of the matters contained therein.

I.

As to what constitutes a banker.

No time need be spent in a discussion of what constituted the business of banking generally, prior to the passage of the internal-revenue laws. Congress had the power to enact laws taxing banks, and it had equal power to define what should constitute banking, and what acts should constitute a person a banker. It has done so in clear and explicit terms. Section 3407, Revised Statutes gives us the definition and by that we are bound.

The counsel for the plaintiff quote from the opinion of Mr. Justice Strong, in the case of *Selden* vs. *The Equitable Trust Company* (94 U. S., 420), a case upon which we also confidently rely, and then follow the quotation, with the following remarks of their own:

> Now, the *broker* does not *receive* stocks and bonds either for discount or for sale. He receives them

> upon a purchase of and payment for them, and he delivers them to his customer, or disposes of them according to his customer's order. In no sense is his business to receive securities for discount or for sale, or to loan money upon them. Such occurrences are rare and purely incidental to the business out of which he makes his profits; namely, the *buying* and the *selling* of stocks and bonds. He may resort to any legitimate shift to carry on this business, and yet not constitute such shift his general business. One would not designate a pawnbroker as a banker, nor would the *business* of a pawnbroker and the capital employed in such a business be correctly denominated the business of banking and the capital employed in the business of banking.

We submit that counsel surrender their whole case by the above statement, in view of the facts exhibited in the record.

In stating that "the broker does not receive stocks and bonds either for discount or for sale," they leave us to infer that persons who *do* receive stocks for discount or sale thereby become bankers, and when counsel say that "in no sense is it his (the brokers') business to receive securities for discount or sale," it follows that if the so-called broker *does* do it he thereby becomes a banker within the meaning of the statute.

Again counsel say "he (the broker) may resort to any legitimate shift to carry on this business, and yet not constitute such shift his general business." We grant that "he may resort to any legitimate shift to carry on his business." But when these "shifts" become frequent, as was the case with Richmond, and when the "shifts" con-

sist of such acts as are distinctly described and set forth in the definition of a banker, he must stand where these acts place him, and meet such obligations as they impose. He resorts to these methods for the purpose of adding to his profits, let him not shrink when he is asked to bear the burdens incident to the business he thus voluntarily assumes.

The plaintiff in error has settled this matter beyond controversy. In his testimony, on page 17 of the Record, the following appears:

> Q. Now, you have described the manner of doing business on orders to purchase, won't you please tell the jury about the manner of doing business when you receive orders to sell?
>
> A. Sometimes a customer may write us from the country to sell stock, and then he says he will forward it by mail when sold; another time he may inclose it with the order; another time a customer will come into the office with a certificate and say, "sell this;" another time he may come in and say, "sell this and I will deliver the certificate to-morrow," and so on. I sell the stock, and when the time to deliver it to the broker or buyer arrives I deliver it and receive his check for it. If the seller wants the money I give it to him. If he does not want it he may leave the money there over night, or two or three days, but that would be only incidental to the business. It isn't my line of business to receive money in that way; it is an incident of the business. When it is left with me, the customer in the country does not make a draft on me; I almost invariably send him my own check.

This is described as an every-day occurrence. It was an important part of his business. It was not a single instance, but many instances.

In another part of his testimony (page 14) he says that the bulk of the stocks that came into his office were placed in a drawer, and might be there for one or two days or a week.

The statute declares that one who receives stocks, bonds, bullion, etc., for discount or sale is a banker and is carrying on the banking business.

When Richmond's customers came into his office with a certificate and said, "Sell this," did he not "receive" the certificate for the purpose of sale? When his customer sent him a certificate with instructions to sell, was not the certificate received by him for sale? When letters were sent to him by his customers, either inclosing certificates of stock, or agreeing to forward the stock in a few days, was not this receiving stocks for discount or sale? When Richmond placed the stocks of customers in his drawer, and kept them there, subject to the order to sell, was not this holding and receiving stocks for discount and sale?

Now, applying the doctrine announced in *Selden* vs. *The Equitable Trust Company*, and quoting that part of Mr. Justice Strong's opinion which is accidentally left out in the brief of counsel for plaintiff, there certainly can be no doubt that Richmond's testimony brings him clearly within the definition of a banker. Following the quotation made by the counsel, and in the same paragraph, the learned judge says:

> But when a corporation or natural person receives from another person for discount bills of exchange or promissory notes belonging to that other, he is acting as a banker; and when a customer brings

> bonds, bullion, or stocks for sale, and they are received for the purpose for which they are brought, that is, to be sold, the case is presented which we think was contemplated by the statute. In common understanding, he who receives goods for sale is one who receives them as an agent for a principal who is the owner.

It is claimed, however, in this matter, that the receiving and selling of stocks by Richmond was merely an incident to the business and not the business itself, or, to use the expressive language of counsel, the receipts and sales were "legitimate shifts." They were not the tree itself, but one branch growing from the main and parent stem. We respectfully submit that these "incidents" and "shifts" were a very considerable and significant part of the plaintiff's business, and they bring him clearly within the spirit and letter of the law.

II.

The counsel for the plaintiff refer the court to the case of *Bouvier et al.* vs. *Blake*, tried before Coxe, judge, in 1883, and state that the court held in that case that Bouvier was not a banker.

The case was not reported, and our only knowledge of it is what is stated by the counsel, and what is shown by the records and files in the Internal Revenue Office.

The records of this office show that the case was tried with the result as stated by counsel, and they further show, what is very significant, that the facts were not fully developed on the trial, and no such case was made as that now under consideration. The case was tried mainly upon the testimony of Bouvier, one of the plaint-

iffs, and upon the facts as then developed the findings and decision were based.

The counsel having referred to the above case and the decision therein, it is proper that we call attention of the court to the fact that another case of the same kind was tried in the same court, with a different result.

The case of *Bouvier & Wallace* against *Blake*, collector, of a similar character, was brought in the same district (southern district of New York) to recover $2,291.67, alleged to have been illegally exacted from the plaintiffs by the defendant as collector of internal revenue, for the tax upon capital employed in the business of banking, under sections 3407 and 3408, Revised Statutes.

The plaintiffs claimed that they were stock brokers and that their business did not in any respect correspond to any of the definitions of banking contained in section 3407.

The case was tried January 30, 1885, before Judge Wheeler and a jury. The plaintiffs called as a witness their cashier, who testified to substanially the same state of facts as Mr. Bouvier testified to in the other case. The cross-examination, however, developed further facts in regard to the business which were not brought out on the former trial, showing the actual course of business of a Wall-street broker.

Upon motion of the United States attorney the court directed a verdict for the defendant, upon the ground that the evidence showed that the plaintiffs had a place of business where money was advanced or loaned on stocks and bonds, and also upon the ground that the plaintiffs had a place of business where stocks and bonds were received for sale.

The plaintiffs did not appeal to the Supreme Court, and the verdict and judgment stands unreversed.

The value of the findings and opinions in the two cases above referred to must depend wholly upon the facts, and it is only when they, or either of them, are shown to be substantially the same as here that they become authoritative in any degree.

III.

It is alleged that the court committed error in refusing to permit certain testimony offered by the plaintiff to be given to the jury.

The court was clearly right in its holdings. The questions asked and which were held incompetent, in nearly every instance, were such as called for the opinion of the witness about the very matter in controversy. Not a single interrogatory in any manner tending to develop the material facts of the case was overruled. It was not for the plaintiff to testify whether he was or was not a banker, but for the court to determine the question upon the facts.

IV.

It is claimed that the court erred in not requiring the jury to make special findings. This was a matter within the sound discretion of the court, and the findings sought to be made were irrelevant and immaterial.

V.

It is claimed that the court erred in refusing to give certain instructions to the jury.

To have given these instructions would have been, under the circumstances, simply farcical. For there in bold relief stood the clear testimony of the plaintiff admitting and asserting a state and condition of facts which rendered a verdict in his favor impossible.

If he told the truth he was a banker; he was engaged in a business fully described in the statutory definition. He had a place of business; he was receiving stocks for discount or sale; he was holding his customers' money on deposit; he was keeping an account with them; he was advancing money on stocks and bonds. Neither the jury nor court could find otherwise, and no refinement of reasoning or sophistry, or division or subdivision of definitions could obscure the patent and controlling facts.

VI.

Some claim is made that there was error committed as to the amount of capital engaged in the banking business by Richmond. Richmond denied that any of his capital was so engaged, and this is the main question. But if he was engaged in this business at all, then the amount was correctly given, and there was no chance for controversy. When called upon to pay the tax, he had himself fixed the amount upon which he was required to pay. It was not done by the collector, but by himself. In his testimony he makes the following statement:

> Q. How much capital did you have in your business at that time?
>
> A. I have forgotten; it was nothing like $300,000; it ranged from $30,000 to $50,000. It was on that capital that I made the return for taxation; I had

in business that amount; it was on that return that I was taxed one twenty-fourth of 1 per cent. per month and, it is to recover back that tax that this suit is brought.

VII.

It is claimed by counsel that the case should have been submitted to the jury upon the facts, without any direction as to their verdict.

It is a well established practice in all the courts that where the plaintiff has rested his case, and the testimony as given makes it perfectly apparent that he is not entitled to recover, and that no verdict in his favor should be permitted to stand, the court may arrest proceedings at that point and direct a verdict in favor of the defendant. After Richmond had testified in this case, assuming his statements to be true, he was not entitled to relief, and it was in the interest of the public business, as well as of truth and law, that the jury should be directed to return a verdict in favor of the collector.

ALPHONSO HART,
Solicitor of Internal Revenue.
O. W. CHAPMAN,
Solicitor-General.